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CONTENTS OF SUPPLEMENTS

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

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President, Frederick W. Mansfield. *Treasurer*, John W. Mason. *Secretary*, Frank W. Grinnell.

Known bondholders and other security holders, none.

FRANK W. GRINNELL.

Sworn to and subscribed before me this 5th day of March, 1930.

GRAFTON L. WILSON,
Notary Public.

[SEAL]

PUBLICATION COMMITTEE.

The President, *ex officio*.
George R. Nutter, of Boston.
T. Hovey Gage, of Worcester.
Dunbar F. Carpenter, of Winchester.
The Secretary.

Entered as Second-Class Matter at the Post Office at Boston.

THE TWENTIETH ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION.

In accordance with notice duly issued, the twentieth annual meeting of the Massachusetts Bar Association was held at the rooms of the Boston Bar Association in the Parker House on Tuesday, December 31, 1929, at 11 A. M.

President Mansfield presided.

The report of the Committee on Nominations, having been printed in the notice of the meeting and no other nominations having been received under the by-laws, the meeting proceeded to the election of officers and, upon ballot being taken, the officers thus nominated were elected.

The meeting then adjourned for the transaction of further business until Saturday, March 8, 1930, at 2.00 P. M.

F. W. GRINNELL, *Secretary.*

THE ADJOURNED MEETING.

The adjourned twentieth annual meeting of the Massachusetts Bar Association was held at the Parker House, Boston, on Saturday, March 8, 1930, at 1.00 P. M. The President, Frederick W. Mansfield, called the meeting to order.

MR. GRINNELL.—I move that the reading of the record of the last annual meeting be dispensed with, as it was printed in the QUARTERLY for May, 1929, which all members have had.

THE PRESIDENT.—If there is no objection, the reading of the minutes will be dispensed with.

THE SECRETARY.—The original annual meeting was called for December 31, and adjourned to today. The officers were elected at that meeting, as no other nominations had been received under the by-laws than those presented by the nominating committee. Accordingly the business of the present adjourned meeting is the reports of committees, and any discussion which may take place.

REPORT OF THE EXECUTIVE COMMITTEE.

Since the annual meeting of 1928, there were two meetings of the Executive Committee, one on December 29, 1928, at which former Attorney General Reading and his counsel were heard on

the question of calling the matter of his conduct in the office of attorney general to the attention of the court. At their suggestion,

It was Voted that a subcommittee should be appointed to consider the matter.

Another meeting was held on March 23, 1929, at which the President explained that as a result of various conferences the officers of the association found that the appointment of a special committee to conduct hearings would serve no useful purpose for any one as such hearings would not be judicial hearings; would simply delay and complicate the situation and probably would result in the whole matter being brought before the court by some one other than the association regardless of any report which such a committee might make.

After discussion, the previous vote for an appointment of a committee was reconsidered and, as stated in the MASSACHUSETTS LAW QUARTERLY for May, 1929, the matter was brought before the Supreme Judicial Court by a presentation following the practice explained by the court in the *Casey Case*, 211 Mass. 187, and calling the attention of the court to the articles of impeachment which had been prepared in the House of Representatives before the resignation of Mr. Reading, and submitting the whole matter for such action as the court might deem expedient.

Thereafter, Mr. Mansfield, President of the Association, and Mr. Carpenter, Assistant Secretary of the Association, were appointed by the court to conduct proceedings against Mr. Reading.

After an extended trial before Mr. Justice Sanderson, the court found all allegations in the articles of impeachment were sustained and ordered the disbarment of Mr. Reading in June, 1929.

At the meeting of the Executive Committee on November 21, 1928, the President, the Secretary and Mr. Raymond Wilkins were appointed as a committee with authority to arrange for the preparation of Massachusetts Annotations of the Restatements of the Law of Contracts of the American Law Institute, and to plan for their distribution in such manner as they deemed within the means of the association.

No action was taken under this vote until recently.

At a conference with Professor William Draper Lewis, Director of the Institute, it appeared that plans have been adopted by the Institute to co-operate with committees of the bar associations in the various states for the preparation of these state annotations. Mr. Lewis and Mr. R. G. Dodge, a member of the Council of the

Institute, requested the selection of an annotator approved by the Institute for each of the subjects of conflict of laws and of contracts, restatements of which were expected to be ready some time next fall; and the appointment of a joint advisory committee of seven of the Massachusetts Bar Association and the Bar Association of the City of Boston to confer with and supervise the work of the annotator. The preparation of such annotations has already been begun in New York, Pennsylvania, Michigan and other states.

At the suggestion of Mr. Dodge, the President of the Massachusetts Bar Association is to act as chairman of this committee. The President of the association then appointed Messrs. Irving W. Sargent, of Lawrence, Edward M. Dangel, of Boston, and Richard C. Curtis, of Boston, to act with him upon the committee. The President of the Bar Association of the City of Boston appointed Harold S. Davis, of Boston, H. LeBaron Sampson, of Boston, and Frank L. Simpson, of Boston, to serve on behalf of that association.

A sum not exceeding $2,000 has been appropriated, one-half of which is to be borne by each association, for the employment of the annotator and other expenses of this work. It is expected that the final restatements on both subjects mentioned with their Massachusetts Annotations thus prepared will be ready for distribution in the fall of 1931 in convenient form and that they will prove of great practical use to the bench and bar of Massachusetts as well as of other states.

Respectfully submitted,

F. W. GRINNELL, *Secretary*

The report was placed on file.

THE SECRETARY.—I have the report of the treasurer here.

ABSTRACT OF TREASURER'S REPORT.

RECEIPTS.

Balance from Prior Account	$3,997.42
Dues received	5,525.00
Interest, Worcester Mechanics Savings Bank	145.52
Advances in Reading Case returned	1,000.00
Total Receipts	$10,667.94

PAYMENTS.

The Itemized Expenses in the Report, including the advances for the Reading Case which were repaid as above stated, amounted to	$6,157.66
Balance on hand December 28, 1929	4,510.28
	$10,667.94

JOHN W. MASON, *Treasurer.*

THE SECRETARY.—The expenses cover a variety of items which I will not read unless requested. The bulk of the expense is the printing of the QUARTERLY, the services of a stenographer, and so on, for the secretary, and a variety of miscellaneous items similar to those in previous years.

THE PRESIDENT.—As to the item of about $1,000 on the Reading case, there were a lot of expenses that had to be incurred by Mr. Carpenter and me in preparing the case for trial, and rather than use our own funds the Association advanced us $1,000. We used that, and then when the case was finished and our bill was paid the expenses were included in it, and the County paid it, and the $1,000 was returned.

[On motion duly made and seconded the report was approved.]

THE SECRETARY.—I have here a report from Mr. Nichols as chairman of the Committee on Legislation.

REPORT OF COMMITTEE ON LEGISLATION.

To the Members of the Massachusetts Bar Association:

The 1928 Committee on Legislation urged that the committee of the following year be appointed at a sufficiently early date to enable it to take more active steps in presenting and supporting such recommendations of the Judicial Council as met with its approval, and the present committee was accordingly appointed on December 17, 1928. The committee almost immediately met, and after a series of meetings voted to approve a substantial number of the recommendations of the Judicial Council.

The specific recommendations thus approved were divided up among the members of the Committee, and each member was made responsible for one or more of the recommendations. This responsibility included the duty of drafting a bill, if one had not already been drafted by the Judicial Council, causing it to be introduced into the Legislature, attending the hearings upon the bill, and in general following it up in its course through the Legislature. This system worked splendidly. Each member carried out his assignment with fidelity and enthusiasm. The fact that eleven recommendations of the Judicial Council were adopted by the 1929 Legislature, far more than in any previous year, was no doubt, in part at least, due to the fact that the Massachusetts Bar Association had taken upon itself the duty of seeing that the recommendations of the Judicial Council were actively brought to the attention of the Legislature.

The Judicial Council informally expressed its appreciation of the service which had thus been given and its desire for closer co-operation with the Legislative Committee of the Association.

The unavoidable delay in the holding of the Annual Meeting of the Association, and the late date at which the Fifth Report of the Judicial Council was made public, rendered it impracticable to give the same treatment to the recommendations in that report. The Chairman and several other members of the Committee on Legislation were ineligible for re-appointment in 1930; but when it became apparent that the hearings before committees of the Legislature upon the recommendations of the Judicial Council would be completed before the postponed annual meeting of the Association could be held, the 1929 Committee on Legislation decided to assume that its members remained in office until their successors were appointed, and held meetings in January of this year to pass upon the recommendations of the Fifth Report of the Judicial Council.

The following action was taken with respect to the recommendations:

(1) Part-time service for judges of advancing age. Approved, but without compulsory retirement to such service at the age of seventy.

(2) Technical assistance in land registration. Approved.

(3) Admissibility of entries in the regular course of business but not in account books. Approved.

(4) Penalizing theft of bar examination papers. No legislation thought necessary, as such an incident would not be likely to occur again.

(5) Provision of chair for witnesses. No legislation thought necessary.

(6) Survival of actions of deceit. Approved, and the committee went further and recommended that the right of action should survive even if action was not brought before the death of a defendant.

(7) That inquests should not be mandatory. Approved.

(8) That the maximum fine in serious automobile offences be increased to $1,000. Disapproved.

(9) Defining "final conviction" in cases of driving under the influence of intoxicating liquor to include pleas of nolo, suspended sentence, probation or placing case on file. Approved, Mr. Sullivan dissenting.

(10) Recognizance to run in either town in which a district court is sitting. Approved.

(11) To avoid double trials on the facts in misdemeanor cases entered in the Superior Court. Approved.

(12) To clarify the law for expediting the collection of debts. Approved.

(13) That when fines in motor vehicle cases include expenses, those expenses should be credited to the municipality which paid them.

(14) That probate courts have jurisdiction of contested claims against estates. Approved, with further suggestion that provision be made for set-off or counter-claim.

When the meetings with respect to 1930 legislation were held one member of the committee had been elevated to the Superior Court bench, and others were sick or absent from the Commonwealth, or unable to attend the hearings of the legislative committee; but the foregoing items were divided up among those members of the committee who were present and able to perform the work, and each matter approved was presented at length before either the Committee on the Judiciary or the Committee on Legal Affairs by one or more members of the Massachusetts Bar Association Committee on Legislation.

Respectfully submitted,

PHILIP NICHOLS, *Chairman.*

THE PRESIDENT.—Is there anything to be said relative to this report? If not it will be placed on file.

MR. GRINNELL.—We have no report as yet from the Grievance Committee. The secretary of that Committee told me that the work of the Grievance Committee was increasing, apparently partly due to the depression in business in various cities of the Commonwealth which seemed to lead to various activities that were not desirable.

[It was voted that the secretary print the report of the Grievance Committee when received, with the other reports.]

The following report was received later and is here printed as directed:

REPORT OF GRIEVANCE COMMITTEE.

In submitting this report the Committee desires to give expression to the obligation of the bar of Massachusetts to its efficient, and painstaking secretary, Raynor M. Gardiner. He has given generously of his time and thought to the exacting work of the Com-

mittee. It is with deep regret that we learn that he feels that he must pass the work on to another.

The number of complaints has increased materially during the past year. Whether this is due to the fact that the Bar Association is better known than it used to be or because we are getting a poorer lot of lawyers than heretofore, we do not know. While the work of the secretary does not take a great deal of time each day, it does occupy a good many hours a week and we think that the Association should not ask one of its members to do this work for nothing but should follow the example of the Boston Bar Association and pay a reasonable salary.

There is no member of the Committee at present in Fall River or New Bedford. In making up the membership of the Committee it would be well to have a member from each large city in the state. These members need not come to many meetings and the work of actually hearing a majority of the complaints can be cared for by the members of the Committee who live in and around Boston. It is of great assistance to the secretary to have a committee member in distant cities who is willing and able to investigate and give reports on complaints against attorneys in their particular cities.

The fee question is always a difficult one. It has long been the policy of the Bar Association not to interfere in fee cases. This leaves the complainant in a bad situation as he usually cannot afford to sue his ex-attorney to obtain a refund of the overcharge and even if he does sue his attorney successfully, he has to pay his new attorney a larger proportion of the recovery. He is also faced with the additional difficulty that most attorneys refuse to sue brother attorneys. I think the secretary should endeavor to settle all fee disputes whenever possible.

It would be a great help to the secretary if the Bar Association put itself on record as opposed to fees in tort cases exceeding one-third of the amount of the recovery, except in very unusual cases. Where a fee is unreasonable the Association should furnish an attorney to try the case for the injured client. If the Association did furnish such an attorney he naturally would only undertake cases that were clearly notorious. The mere fact that the Association stood ready to furnish such service would tend to settle nearly every disputed fee case before trial.

All we have said in regard to the fee situation applies equally well to cases where attorneys have been guilty of negligence. The

Association should not hesitate to investigate these people and file complaint against them if investigation justifies it.

STOUGHTON BELL, *Chairman.*

THE SECRETARY.—As to the report on membership. I have a list of twenty-seven members that have been admitted during the year.

MASSACHUSETTS BAR ASSOCIATION, NEW MEMBERS.

Jennie Loitman Barron, 11 Beacon Street, Boston.
Frederick A. Bartlett, North Attleboro.
Geoffrey Bolton, 73 Tremont Street, Boston.
David Broude, 19 Congress Street, Boston.
Lincoln S. Cain, 28 North Street, Pittsfield.
Benjamin F. Chesky, Kimball Bldg., Boston.
Joseph A. Cinamon, 43 Tremont Street, Boston.
Douglas Crooke, 1200 Main Street, Springfield.
Joseph P. Fagan, 18 Tremont Street, Boston.
Daniel W. Flynn, 608 Tremont Bldg., Boston.
Felix Forte, 20 Pemberton Square, Boston.
Norman F. Hesseltine, 40 Broad Street, Boston.
James M. Hoy, 1050 Tremont Bldg., Boston.
Vernon W. Marr, 16-A Ashburton Place, Boston.
P. Joseph McManus, Old South Bldg., Boston.
Frederick W. Mowatt, 53 State Street, Boston.
Francis J. Murray, 40 Court Street, Boston.
Harold A. J. Oppenheim, 18 Tremont Street, Boston.
John E. Peakes, 161 Devonshire Street, Boston.
Francis J. Roland, 403 Barristers Hall, Boston.
Samuel M. Salny, 327 Main Street, Fitchburg.
J. Frank Scannell, 31 St. James Avenue, Boston.
William M. Shaughnessy, 618 Barristers Hall, Boston.
Alfred R. Shrigley, 413 Barristers Hall, Boston.
Adam F. Stefanski, 214½ Essex Street, Salem.
Emma S. Tousant, State House, Boston.
Dorr Viele, 12 Shepard Street, Cambridge.

MR. BASSETT, (Chairman of Committee on Membership).—A canvass was made outside of the City of Boston by sending to some members of the Association in each county a list of all the lawyers in that locality and requesting a suggestion which of them might

properly be invited, without any forced drive, to become members of the Association, and that canvass was carried on thoroughly.

THE SECRETARY.—As to the Committee on Legal Education, the Chairman is here and has presented his report in print, in the November QUARTERLY. I do not know whether there is anything to be added to that report.

MR. NUTTER.—No, there is nothing to add. That report seems to have been received with some favor throughout the country as pointed out in the supplemental report to the Executive Committee which is printed in the footnote.*

THE PRESIDENT.—Does anyone want any action taken?

THE SECRETARY.—I don't think there is any action to be taken at the present time. The whole subject, along with some other subjects, have been referred by the legislature to the Judicial Council. Those subjects will be brought to the attention of the

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*MARCH 8, 1930.

To the Executive Committee of the Massachusetts Bar Association:

The Committee on Legal Education begs to report that its report on "Training for the Bar, with Special Reference to the Admission Requirements in Massachusetts" which will be presented to the Annual Meeting was published in a special number of the MASSACHUSETTS LAW QARTERLY for November, 1929.

Copies of this report thus published were sent not only to members of the Association but to all who had assisted in the preparation of the report, including the Boards of Bar Examiners in each state, the educational experts in Massachusetts and various individuals such as Mr. A. Z. Reed of the Carnegie Foundation, Professor H. Claude Horack, Adviser to the Section of Legal Education of the American Bar Association, and others.

Favorable comments upon this report were received from various persons, notably Chief Justice von Moschzisker of the Supreme Court of Pennsylvania, Mr. A. Z. Reed, Professor H. Claude Horack, Mr. Dooley, the Dean of the new Boston College Law School and many of the state boards of bar examiners.

Mr. Shafroth in Denver, who succeeded Professor Horack as Adviser to the Section of Legal Education of the American Bar Association, has written to make arrangements to have copies of this report sent to the Committees on Character in each state in the country, which will necessitate a further distribution of some two hundred and fifty copies. The addresses of such committees are now being compiled by Mr. Shafroth.

New Hampshire sent down for extra copies as well as the Chairman of the Committee of Examiners of the District of Columbia.

William D. Guthrie, the Chairman of the Committee on Character of the New York City Bar Association, wired for twenty copies to show to the members of the New York bench. At the request of Mr. Andrews of North Carolina copies were sent to the members of the Supreme Court of that state. Dean James Grafton Rogers, Dean of the University of Colorado, who was Chairman of the Committee on Legal Education of the American Bar Association, wrote for copies.

The Committee call attention to the various bills introduced at this session of the Legislature regarding not only admission to the bar but disciplinary measures. These have been referred to the Judicial Council. As the Committee understands that it is a standing committee of the Association, it will stand ready to give such assistance as it can to the Judicial Council in the consideration of these questions and to take such part as possible in enabling the Judicial Council to make some definite recommendations. When such recommendations are made the Committee will present them to the Executive Committee and will ask the Executive Committee to consider what action, if any, should be taken in putting such recommendations in effect throughout the Commonwealth.

For the Committee on Legal Education,

GEO. R. NUTTER, *Chairman.*

members in the QUARTERLY, and any suggestions will be welcomed by the Council.

I do not think there is any other regular business, Mr. President.

THE PRESIDENT.—Mr. Joseph Michelman made a motion before the Executive Committee that the President and Secretary send a telegram to Mr. Justice Holmes at Washington congratulating him upon his eighty-ninth birthday (today) and extending the felicitations of the organization, and requested that that motion be laid before the full Association. The motion was carried.

[The meeting then suspended for lunch.]

THE SECRETARY.—There is an opportunity to discuss any of these suggestions which have been made in these various reports. There have been suggestions of one kind and another in addition to those reported on by the Legislative Committee, and copies of them have been sent out to the members in the QUARTERLY. There is the Judicial Council report and the report of the Special Commission on Motor Vehicle Insurance. Both of those reports are still under consideration by the Legislature. This is an opportunity for any members of the Association to make suggestions. Sometimes in previous meetings we have had some very useful discussion.

MR. TIMOTHY M. HAYES (of Greenfield).—Mr. President, I had a rather peculiar coincidence in the last few months, that you have probably had some experience with, in regard to the compulsory act. I had a case of a minor child who received a fracture of the leg and brought an action, a next friend action, for pain and suffering, and a separate action for the father. The father's bills, doctors', hospital and so forth, amounted to $810. The jury brought in a verdict of $2500 in the broken leg case and a verdict of $810 in the father's separate action. The insurance company sent one check for $2500 and refused to pay the $810. Their position was that the Compulsory Act used the words, "bodily injuries". They then referred to the decision in 228 Massachusetts, 191, where the Supreme Court says that "bodily injuries" mean corporeal contact, and in that case they refused to let the husband of the wife who had been injured collect in his separate action for doctor's bills and hospital bills. I have lost $810. I was vitally interested, and I wrote many letters about it. Everybody seemed to answer by saying that they could not get around the language of the Supreme Court in that case, and suggested that after the words "bodily injuries", a comma be placed, and that the words such as, "and

doctors' bills, hospital bills, nursing bills and other incidental expenses necessary because of said injuries", be inserted. That decision seems to defeat the very purpose of the compulsory law. I wondered if anybody else had lost any money by that language.

MR. GRINNELL.—I would answer that by saying that that situation was called to the attention of the Commission just before the report was going into print, so that we did not have an opportunity to consider and discuss it in the report, so that it is at present in the air, but I think it is a thing that should be covered, and I have got somewhere in my office a typewritten draft of an act somebody drew to deal with it.

MR. HAYES.—Well, I guess the practical experience of all of us has been that about the first question the insurance companies ask any of us is, "What are your doctors' bills and hospital bills?" But now many insurance companies have not paid them because of that case, and other insurance companies learning about the decision are doing the same thing.

MR. GRINNELL.—Do they do that where there is a single plaintiff? Isn't there some method of covering it in, so to speak?

MR. HAYES.—Well, that raises a question. If the language of the Supreme Court is going to be interpreted just as it is worded, I assume if you got hurt they might say to you that "bodily injuries" in the Compulsory Act were restricted to your pain and suffering, and even though you might contract as an individual for your doctor's bills and hospital care, you might not be able to collect under that decision.

MR. MCCLENNEN.—The insurance companies have been paying for years, have they not, for the injuries of persons on the back seat of the automobile without inquiring whether they were asleep or not?

MR. GRINNELL.—Well, I suppose if they are in an automobile, and the automobile has had personal contact with another automobile, so to speak, it is personal contact all along the line.

MR. HAYES.—But this decision says that the words, "bodily injuries" mean corporeal contact plus an organism, to use the exact words of the Supreme Court.

MR. GRINNELL.—There is corporeal contact between the people on the back seat and the back seat which has been in contact with the other automobile, while it is not necessarily connected with the doctors' bill corporeally.

MR. HAYES.—I wrote the secretary of the commission as soon as the Insurance Company relied upon this decision and he wrote

me by return mail that you had already printed your report and it was a bit late, but he thought there would be a law drawn, because there is not any doubt that this decision defeats largely the purpose of the compulsory act.

MR. GRINNELL.—I wish you would write your suggestions, and I will try and steer them to somebody's attention and consider them.*

MR. MCCLENNEN.—If the act is going to be tinkered, ought it not really to be carried to the point of taking care of damages, anyway, not limiting it to the personal injuries?

MR. GRINNELL.—You mean to cover property damage?

MR. MCCLENNEN.—To cover property damage.

MR. GRINNELL.—That is a point on which there is marked difference of opinion. The Judicial Council last year recommended that it should be. Being in a somewhat peculiar position, sitting on the Insurance Commission, with their recommendations, I became, as I thought it over, rather uncertain about it, and accordingly what we said about it in the insurance report was that we did not advise it at the present time, but did recommend some changes in the procedure which would make it more possible to ascertain the facts as to whether or not there was property damage or personal injury, and thus avoid the discovery of a nervous shock sufficiently serious to cover the cost of a mudguard. The Legislature does not show any particular interest, I think, in the recommendations about changes of judicial procedure which have been suggested, and the difficulty with extending the thing to property damage is that some people think it would very largely add to the congestion of the courts as it now exists, and that it is a thing which is not to the same extent within the province of the state to require as a compulsory matter of insurance, as in the case of personal injuries. It is more like the ordinary damage claim for which insurance is not required. It is not so directly connected with what is called safety on the road. The Compulsory Act was not passed as a safety measure. It was passed as a security measure, to protect people who are injured, and some people have raised the question whether the legislative authority to regulate the highways would extend to a compulsory requirement for insurance against property damage.

THE PRESIDENT.—Of course that decision does not leave the

* The legislature subsequently passed an act (St. 1930, C. 340) dealing with the subject.

plaintiff without a remedy. He has his judgment, if it is any good, against the defendant.

MR. GRINNELL.—Oh, yes.

THE PRESIDENT.—He cannot pursue it against the insurance company.

MR. GRINNELL.—No. There is no compulsion. The problem is whether or not the requirement, that as a condition of using the highways you should insure against property damage, is a matter of legislative power, or whether it is good policy.

MR. SULLIVAN.—I think that while the Compulsory Act should not include other than strict bodily injuries, if you have an opportunity to look at the insurance policy you will find that the insurance policy is probably broad enough to include the indirect damages too in most cases.

MR. GRINNELL.—There is one thing I would like to say in regard to that insurance commission report and the suggestions in regard to judicial procedure. They were all of them based primarily on the fact that the Compulsory Insurance Act had given every automobile owner in the state a direct interest, a more direct interest than he had had before, both in judicial procedure and in the amounts and character of the judgments and settlements in every case of personal injury in the state, because every judgment and every settlement entered directly into the loss experience of the particular rating zone, and therefore went directly into the rates or bore directly on the rates; and since all the disturbance about the Insurance Act has arisen largely from complaints of the rates, the amount of losses in settlements was a matter of direct interest to every insured person. There was all this talk about "faked" or exaggerated claims, and there is no way of finding out or telling how many of those there are, so it seemed to the Commission that the most effective method of dealing with those claims was to provide machinery by which the facts could be ascertained more promptly and effectively, and thus explode the fake. Among those recommendations were such as examination by an impartial doctor, the admission of impartial medical testimony by doctors appointed by the Court, the opportunities for oral examination of parties before trial, and a variety of recommendations were made with that in view, and with the further fact in view, which has been referred to by the Judicial Council and referred to by this Commission, that unless some more effective method of dealing with the accumulating jury cases in the courts, these personal accident cases, is invented

by the bench and the bar, that the whole business is going to be lifted out of the hands of the bar sooner or later. Just when or just how nobody can say, but this thing is not at all confined to Massachusetts. There is a movement which was referred to by the Committee which reported at Memphis, and which was created by the Conference of bar delegates as a result of the investigations in New York, Philadelphia and Milwaukee about damage cases. It is referred to, I notice, in the latest report from the Dean of the Columbia University Law School referring to the creation of a research commission under the auspices of Columbia University, of which Arthur Ballantyne, who used to be a member of this bar, is Chairman, which is studying the possibilities of some form of compensation act for accident cases similar to workmen's compensation. Whether that will develop I don't know. It is at present in the air, but they have been making inquiries in Europe, and they are trying to collect statistics as to insurance experience, and so on, in this country, and sooner or later there will be quite an exhaustive report on that subject. The members of that Committee are men of experience like Mr. Kresel, who conducted the New York investigation, and Mr. Drinker, who was chairman of the Philadelphia investigation, and Judge Marks of Cincinnati, who is quite active in all this movement.

Governor Smith and Governor Roosevelt both referred to the matter in their addresses to the legislature within a year or two, and there was a committee of the New York Bar, consisting of Judge Hughes and Mr. Henry W. Taft and Judge Dowling, and others to the number of ten or a dozen who brought the matter up formally before Governor Smith, as I remember it, for consideration.

Now, it looks as though something of that kind was developing which is likely to appeal to the layman sooner or later, and unless the bar and the bench can invent some method of dealing with these things in court more quickly and without this cumbersome business of a jury trial in cases the bulk of which, as Mr. Carpenter's analysis of the figures has shown, results in verdicts for less than $500. Instead of paying $500 a day it would be cheaper for the Commonwealth to pay all the verdicts of the Superior Court than it would be to try the cases. I think that is likely to attract attention which may overrule the desires of the bar eventually and take it all out of our hands. The commission believe that those things

should be settled by the Court, if practicable, and it was with that in view that some of these recommendations were made.

Thus far the recommendation that has attracted most interest in the Judiciary Committee is the one which recommended that about fifteen special justices of the District Courts should be designated as men whom the Chief Justice of the Superior Court could call in to try automobile cases upstairs, in the same way that he calls in some of the regular justices to try criminal cases. There are, of course, about 140 specials, and, whatever anyone thinks about the special justices of the district courts, there are unquestionably enough men there who can deal with such cases so that the Chief Justice could find fifteen of them to designate as possible additional judge power for the Superior Court.

MR. MCCLENNEN.—Still jury trials?

MR. GRINNELL.—Jury trials or jury waived trials. It was recommended as an experiment in connection with motor vehicles which form the bulk of the increase since the law went into effect. There are about 9,000 cases a year additional entered in the Superior Court since the law went into effect.

MR. THORNDIKE.—Do you find that the District Court judges will give a good reception to the cases that are tried out before them, or are they inclined to choke everything off which comes up from the District Court and impose at least as large a sentence, almost, as the lower court judge, if not a little bit more?

MR. GRINNELL.—That may perhaps be so.

MR. THORNDIKE.—I think they are the toughest bunch you meet on the Superior Court bench.

MR. GRINNELL.—That may perhaps be true, and how far they are justified I do not pretend to say.

MR. THORNDIKE.—That has been my experience.

MR. GRINNELL.—I take it that it is the fact that that act has broken the congestion in the criminal side of the Superior Court, and that it has reduced the appeals merely for the purpose of dickering for a reduced sentence with the district attorney, which used to be the situation.

MR. THORNDIKE.—Well, probably it is not desirable where you have a district attorney who is so busy that he cannot try cases unless he is forced to dicker with you. On the other hand, the mere fact that somebody has choked off a lot of appeals and disposed of a list does not mean that he has necessarily done justice in a great number of cases.

MR. GRINNELL.—That, of course, is perfectly possible, and I suppose abstract justice is not obtainable under any system.

MR. THORNDIKE.—I am afraid so.

MR. GRINNELL.—But I should suppose that the present system was an improvement on the old one, whatever may be the faults of the present.

MR. NORTON.—Isn't it true that there has been quite a substantial increase in the number of jury waived cases handled? I was so told by one of the jury waived clerks.

MR. GRINNELL.—I think perhaps that is so. The jury waived is several months behind, I believe, on its list. I think myself if something could be done to encourage the use of jury waived hearings, it is advisable.

MR. MCCLENNEN.—If the matter is going on in the way that it is at present, if the conclusion is reached that fifteen more judges are needed to handle it, is there any particular wisdom in having a special class of judges for automobile cases? Does it not really mean that fifteen more judges are needed on the Superior Court?

MR. GRINNELL.—Well, that is a question. Of course every permanent judge that you add to that court adds to the problem, the administrative problem of the court, and the advantage of using some of the existing judicial material means that you have a more or less elastic system. You do not have to create fifteen $12,000 judges to try $150 automobile cases.

MR. MCCLENNEN.—Is it the idea that these specials called in for automobile cases would be less highly paid per diem than regular judges of the Superior Court?

MR. GRINNELL.—Well, the compensation would be measured. A figure has not been set. At the present time the figure on the criminal side is set at a proportionate amount per diem of the Superior Court judge's salary, and some such approximate figure would be reached, I suppose, in connection with this other. Whether or not it would be equally as high as that I do not know.

MR. NORTON.—Isn't the practical difficulty the getting through the Legislature legislation providing for permanent judges, on account of the increased expense, whereas they might be willing to pay special judges a per diem compensation without paying them by the year? Isn't that a practical or an economical element that enters into it?

MR. GRINNELL.—Certainly. When you come to add fifteen full-fledged permanent judges to the Superior Court, you run up against

the Ways and Means Committee. But here you have a district court system which is experienced in dealing with these things, and the chances are you would get quite as competent men and carefully selected men.

MR. THORNDIKE.—Are you going to select your group to fill in temporarily the places of the Superior Court judges from the district courts?

MR. GRINNELL.—The proposal is that about fifteen special justices of the District Courts, of whom there are about 140 now throughout the Commonwealth, should be selected by the Chief Justice. In the case of the Superior Court criminal work it is only regular justices that are called in by the Chief Justice of the Superior Court. The difficulty of extending this plan for motor vehicle cases to include the regular justices of the District Court is that even the present criminal work of the Superior Court interferes to some extent with the District Court work. It takes the administrative head of the District Court off the bench, and with the increase of civil jurisdiction, being now unlimited, it is important that the regular judge of that court ordinarily should be on hand, and some of the judges I think who have been sitting on criminal cases have asked to be relieved of that service because of the work of their own court. Just how much the enlarged jurisdiction of district courts will be used under the recent act of 1929, you cannot tell, but the experience thus far has been that every time you increase the jurisdiction of the District Courts, that increased jurisdiction is used to an increasing degree on the civil side, and that is the least expensive method of providing for additional judicial facilities for business, the least expensive to the public and everybody else so far as the court fees and overhead, and all the rest is concerned.

MR. MCCLENNEN.—Did you say that no favor had been gained for any plan for eliminating jury trials in automobile cases?

MR. GRINNELL.—Well, I don't know what the Committee is going to report, but judging from the hearings and discussion thus far, the suggestions of alternatives for jury trial and putting conditions on the right to reach the insurance have not excited much enthusiasm on the part of the judiciary committee. They did not seem to feel that there should be any such conditions put in the way of jury trial.

MR. THORNDIKE.—Is it considered desirable to have just as few jury trials as you can? Is that the purpose of things?

MR. GRINNELL.—Yes in this sense to reduce the size of the jury docket which blocks other business at great expense. The number of cases tried would be about the same as now.

MR. THORNDIKE.—I should be very much against that.

MR. GRINNELL.—Well, the point is that at present a jury trial is claimed to a very considerable extent, not for the purpose of getting a trial, but as a kind of a club in horsetrading for a settlement. It is perfectly natural that that should be so, but that was not the purpose of the constitutional right to jury trial. There are I have forgotten how many thousand jury cases entered every year, but the Superior Court does not try any more than about 2,500 cases of all kinds.

MR. THORNDIKE.—It can't.

MR. GRINNELL.—No, it can't, and unless you double the size of the Superior Court it never can try the cases on its docket, probably.

MR. THORNDIKE.—Well, take the situation in Plymouth County and Brockton. There is a court house with two new Superior Court rooms that lie idle nine months in the year. I don't know why you should have to maintain a tremendous organization, but if you keep somebody on that bench with a limited number of jurymen, changing the panel from time to time, you could walk through that list in the course of a few months without very much expense to the county, and you could make them come to trial, you could put those cases on the list and make them fish or cut bait or go ashore, and get rid of them.

MR. GRINNELL.—You could use some of these special justices there. There is a good deal of court house space in some places not used, but you have got the mounting cost of the administration of justice.

MR. THORNDIKE.—I would much rather try what cases I have before a jury than before a single justice. I am more satisfied with the result. Most of the judges that you try cases before it does not seem to me give you adequate damages. They are too arbitrary. Each one is convinced that in some way he is endowed with the power to see through the facts and arrive at a conclusion that must be necessarily right. I would far rather have the combined thought and experience of twelve fellows out in our county than the determination of a single justice of the Superior Court. That may seem rude, but it is my attitude just the same, and I have been at it for twenty-five years.

MR. GRINNELL.—I am not concerned with whether it is rude

or not, but it has been suggested that there should be juries of six put in the District Courts on some principle of waiver. The difficulty with that seems to me to be that I do not see that you would get anywhere. You would just clog the business of the District Courts then, and have the complication of juries in two sets of courts. Thus far the idea has been to put the judges from the district courts into the jury courts rather than to put the juries into the district courts.

MR. THORNDIKE.—I think people would try more cases in the district courts, if they thought the results were better. This is another rude thing to say, but the average district court judge has been sitting on the bench so long,—he has been there since the jurisdiction was $100 or $300, or something like that,—that if you bring an automobile tort case in that court you are lucky if you get a verdict of $347.22, and if you tried it in the Superior Court, where you had a good case you could get two or three thousand dollars, and you might be entitled to it.

MR. GRINNELL.—How do you account for the fact that 50 per cent of the cases tried in the Superior Court to juries result in verdicts of less than $500, and 75 per cent of them in less than a thousand dollars?

MR. THORNDIKE.—Well, I don't know.

MR. GRINNELL.—That seems to be the record of the last two years, certainly. Most of the cases tried by a jury result in very small verdicts.

MR. CARPENTER.—That is only half the cases that are tried.

MR. GRINNELL.—Yes, half the cases that are tried.

MR. THORNDIKE.—Does that include cases where there is a finding for the plaintiff, or are you taking an average of all the cases that are tried?

MR. GRINNELL.—No. In the Judicial Council report for the last two years the figures have been shown of every case tried in the Superior Court.

MR. NORTON.—What he means is this: When you say the average verdict is less than $500, does that mean the average verdict for the plaintiff where there is a verdict for the plaintiff?

MR. GRINNELL.—Yes. Fifty per cent, at least 50 per cent of the verdicts are for the defendant. Of the remaining cases, of 2,500 cases tried, 1,350 cases, or 1,250 cases, whatever it is, the verdict is for the defendant. Of the remaining 1,200 cases, and so on, say 650 have a verdict for less than $500, and 75 per cent of that 1,250 are

for a thousand dollars or less. The only cases in which verdicts are above a thousand dollars are limited to about 300 cases, both contract, tort, jury waived and everything else.

MR. THORNDIKE.—Does anybody know what the figures would be for the District Courts on that classification?

MR. GRINNELL.—The cases are not there.

MR. THORNDIKE.—But the tort cases in the Superior Court?

MR. GRINNELL.—In the Superior Court cases as I remember it, the size of the jury waived verdicts was equal to the size of the jury verdicts, and on the whole a little bit larger.

MR. THORNDIKE.—What would be the average finding in the District Court on cases of that same type? I will bet you that $500 is more than you would get downstairs.

MR. GRINNELL.—I don't think $500 is the average. Most of the verdicts are down to $150, $250 and $300.

MR. THORNDIKE.—A lot of the cases are cases where there is not very much damage done.

MR. GRINNELL.—Ought those cases to be tried to a jury at all?

MR. THORNDIKE.—If they would settle, then perhaps you would not have to try them, but you are forced to try them.

JUDGE KEYES.—It seems to me your proposition of having a set of specials is a first-rate proposition. The specials are not dealing then with cases which have been appealed. They are coming before them either with or without a jury *de novo*, and then, too, your specials are not old men who have been sitting on the bench too long, but they are practising lawyers by and large. There are very few specials who are doing enough justice work to occupy any material part of their time. Most of the specials are practising lawyers. I do not see why that does not provide from an economical point of view a very flexible arrangement. As the business increased they could increase their duties. If the business falls off, then they disappear and they are not $12,000 men.

MR. DUNBAR F. CARPENTER.—I have an idea which came to me recently. As I have thought about this matter I have begun to feel that the whole situation is slipping away from us, that we are really talking about something that was possible ten years ago, that our minds are ten years behind, and that we are not facing the present situation. I will explain it to you in this way. I will have to use a few figures, but there are not very many.

We started off in 1925 with the number of new law cases entered, that is, jury and jury waived, of 23,090,—say 23,000 in round

figures; in 1926 practically the same, an increase of about 200; in 1927 it went up to 24,516. Of course these figures are for the court year ending June 30th of any year, so when I say the year ending 1927, I really mean the year ending June 30, 1927.

Now, the automobile insurance act only went into effect the first of that year. There are only six months of it, then, shown in these figures, and of course the cases that could have been brought in the first six months are practically negligible. Yet you see an increase, although 1925 and 1926 were the same for all practical purposes, you see an increase for the year ending 1927 of 1,500 cases over the two previous, which I think reflects some of the automobile cases.

We then come to 1928, which is the first full year, of automobile insurance, and you get 32,000 cases. You have jumped up 8,000 cases a year. You have jumped up 9,000 from 1926. And in 1929 there is also an increase of a thousand, from 32,500 to 33,165. That is only about 600.

MR. MCCLENNEN.—This is the Superior Court throughout the Commonwealth?

MR. CARPENTER.—Yes. Now, this year I happened to notice what Clerk Campbell said the other day in a paper, that the law and equity actions piled up in the Superior Court. I called up the executive clerk about it and he told me that for the first six months of the year the increase in Suffolk over the preceding six months was 369 cases. Mr. Campbell says for the first three months of this year there was an increase of 372 cases over the three months of last year. That is a total increase in Suffolk of 731 cases. With three months to go, suppose 300 more cases come in, then you get a thousand cases increase in Suffolk, and Suffolk has half the cases in the Commonwealth, approximately. But let us assume as a guess that there is another thousand increase throughout the Commonwealth. That means 2,000 more cases. So that when the court ends this year on July 1st, there will be an entry list I assume of something over 35,000 cases.

Now, last year the jury cases tried were 2,121, and the jury waived, I think, were 390,—about 2,500 cases all told, which is somewhat less than it was the year prior, but I think there are never more than 3,000 jury and jury waived civil cases tried in the Commonwealth in the Superior Court, so that the entry list that we are getting now is about ten times greater than the number of cases tried.

Now, the figures for 1902. Those appear from a memorandum prepared by the late Joseph J. Feely in 1902. There were 14,644 new civil cases added in that year. I think the way it is phrased it does not say law cases, but does say civil cases. I think that means jury cases. It does not mean equity cases, but equity cases now are running 3,000 to 3,500 a year. They are pretty steady, apparently. Mr. Campbell says they are going up now. So apparently in 1902 there were civil cases at law, possibly, of 12,000. Now they are running something like 33,000.

THE PRESIDENT.—You mean pending or new cases?

MR. CARPENTER.—New cases.

THE PRESIDENT.—Entered that year?

MR. CARPENTER.—Yes.

THE PRESIDENT.—14,000 in one year?

MR. CARPENTER.—Yes, that was 1902. That includes equity, and you have got 33,000 entered last year, law only, and adding 3,000 more equity cases brings you up to something like 33,000 cases.

Now, the problem is getting away from us. Of course, it is perfectly possible to try all those cases. You could have a hundred judges or 200 or 1,000 judges. There is no trouble on that end of it at all. But what you are faced with, it seems to me, is the imponderables, and I think particularly the cost is what you are "up against." How much is the State willing to pay to try these cases? If you were to double the size of the courts, of course you would not take care of this list, and you would pretty nearly double the expense, perhaps you would more than double the expense, which the Judicial Council I think estimated at something like $6,000,000 a year. The State alone appropriates something over a million dollars, had to last year, for the courts, and, of course, the County expense is very much greater, the jury fees, and all that, so that it seems to me a situation that the bar ought to think about. It is not the difficulty of getting rid of these cases, if you really wanted to, or if the Legislature would appropriate the money, but how are you ever going to take care of a list of 33,000 cases? And, of course, it is going on all the time. I do not think the automobile cases are going to jump very much, not as they have, of course. But when I was talking with the executive clerk, he thought this year was just what you would call the normal increase. So you are going to have a normal increase of one or two thousand cases a year.

Now, when the court adjourned last June here in Suffolk, it

was two years and three months behind. The date of the latest writ tried as I remember it, was something like June, 1927. At that time it had not tried, you see, any of the automobile cases under the Automobile Compulsory law except a few that were entered in the very first part of 1927.

Now, with an increase of at least 8,000 cases a year over 1926, you have got a situation where the time between the date of the writ and the date of your trial is going to increase tremendously. With a 50 per cent increase in cases such as you have here, other things being equal, it is going to take 50 per cent longer to get the case reached. So I see a situation, and not very distant, inside of five years, where no case is going to be tried here in this Commonwealth that is not five years old. You can figure it out with paper and pencil just as well as I can.

Now, what is going to happen when that situation arises? Of course, people are not going to wait five years to get $150 or $200 for an automobile accident. I don't know what is going to happen. It may be the best thing for the bar to have these automobile cases, which seem to be according to the verdicts rather small, taken out of the courts so that your courts could get back to real business, to the contract cases and the other matters, the equity cases. Of course, your equity is going to suffer. Everything now is giving away to the motor tort cases. Look at the paper every morning, the *Herald*, and you see a list of those being tried up there. Nine out of ten have something to do with motor accidents, I should say, so the whole court is turning into kind of a motor court, and your ordinary litigation, particularly the mercantile litigation, which of course can't wait, it seems to me simply is not being brought and is going to be crowded out more and more, so that the Superior Court is going to become almost nothing but a motor tort court. And even then it is not going to be able to take care of your motor torts because the cost to the State is going to be so terrific. I do not suppose that an appropriation of $12,000,000 a year would anything like clear up this list.

Of course, you have not only got to remember these 33,000 cases last year, but you have got a huge list equally as large as that from prior years, cases waiting to be tried. Even if only 10 per cent of the cases entered in one year were ever tried, your court could just about be even, although it would be falling a little behind now, allowing 3,000 cases to a year and 33,000 entered. If you clean off the docket today and begin the first of next July, at the end of the

next year the court, if every nine or every ten entries should be dismissed in one way or another, would still be a little bit behind, so you see really what a situation you are facing here. We are not facing the situation. The Legislature is not. The mildest little things that have been suggested, for instance, increase in the entry fee of $5, are frowned upon and nothing done; putting on a jury fee,—nothing done. They are just wandering along. The bar, I think, as a whole, does not take any particular interest in it. I think they don't know what the situation is. But surely it is perfectly inevitable that the time is coming soon where something pretty radical is going to be done, because it is perfectly absurd for the state to prescribe that people should take out automobile insurance, and yet provide no way at all whereby they can realize on that insurance except by the grace of the insurance company.

MR. NORTON.—It seems to me that Mr. Carpenter is correct, particularly with reference to jury waived cases. I know in some of the outlying counties there is great delay. It seems to me that could be overcome in substantially the same way we overcome it in Suffolk County. There, as you know, the jury waived and equity cases are tried together on the list, where after the issue is joined you can mark a case up on seven days' notice, and where a year or two ago it took a month, at the present time it takes—

MR. CARPENTER.—I beg you pardon. I was not referring to anything except jury cases.

MR. NORTON.—You speak about equity and jury waived cases as still being crowded. I want to call attention to this fact, that about 3,000 cases are entered each year, and about 300 are being tried, and they have practically taken care of that list of cases. In other words, you do not have to wait very long, certainly in Suffolk cases, to try a jury waived or equity case. Apply the same thing proportionately to the other cases and you will find the Court has taken care of pretty nearly ten per cent of the entries. If there are 32,000 cases entered, of which 3,000 are jury waived and equity, you have got about 30,000 jury cases, and you are trying somewhere between two and three thousand of those cases. I admit the situation is bad. I do not believe that more than one case in ten is actually tried. The situation is bad, but it seems to me one great difficulty and one reason why we do not get these changes in jury trials is because we know perfectly well the public will not stand for increasing the burden upon the poor man who is supposed to have some claim as a condition of his trying an insurance case. He has got a constitu-

tional right to trial by jury, and the minute you add a dollar to the entry fee or to the result as a condition of claiming jury trial, you are imposing something that the public does not want to stand, and whatever may be your feeling, the feeling of the public is that every man ought to have a jury trial if he wants it. It seems to me that that is something we have got to meet, and I do not believe the temper of the public at the present is sufficient so that any legislature will dare to take motor torts out of jury trials. Of course, the ideal way would be to increase the number of justices in the Superior Court enough to handle the business, but the Legislature will not stand for that, and therefore it seems to me the suggestion made that we have talked about is a very wise one, whether it be by selection of district judges or some other way, that somebody go in and handle those cases.

MR. THORNDIKE.—I am very much in agreement with the gentleman who has just spoken. It does not help to increase the entry fee. Suppose you made it $50 in these automobile accident cases, that would result in such cases being entered, but would not result in justice. What happens in one of these automobile cases is this. A couple of fellows come together at a corner. Both cars are more or less damaged, and some people on both sides are hurt. Each side flies to a lawyer with a story of the accident. Each man sends a letter to the other fellow that an accident took place on such and such a day and they would be glad to know the name of the insurance company. You get into court with perhaps three or four cases on each side. There is the compulsory insurance, there is damage to the two cars. If the man who is in the accident wants to recover anything for himself he has got to hire his own lawyer. If he carries compulsory insurance, and property damage is claimed from it, he has got to hire his own attorney to defend himself against a claim for property damage, and the insurance company tells him so. So you frequently have a suit, a cross action, and two lawyers on each side, the insurance company's attorney, the individual's attorney, and I have occasionally, when I have been sitting on the bench, observed the efforts of the insurance company's lawyers to gum the case up so it will be a case of negligence on both sides and nobody would get anything. The insurance companies do not pay anything unless they are obliged to. These cases have not all got to be tried. If trial was imminent, they would settle them, but they are perfectly safe by having so and so enter his appearance with a general denial for contributory negligence, and hang it up for two

years, and settle it before it comes up for trial. If you could start that thing,—it is like a jam of logs in a river. You find the key log and the rest of it will go down stream. If you had somebody grinding at that list, and made them come right up and try these cases, there would be thousands of settlements made. Make them think the thing is moving along, and if it is not tried in March it will be probably reached in May, and you will get some settlements. If you go to your insurance company and tell them the facts and lay your cards on the table, and if they would deal with you fairly, you could settle these cases.

I notice in one of these Massachusetts QUARTERLIES a good deal is said about conciliation. I think I can truthfully say that in twenty-five years' experience at the bar I have never heard a representative of an insurance company say, "You have a good case; your damages I think are fairly so and so; we will pay your damages." No matter what you name, they always cut it in two. There is no fun in being the only fellow who will say, "The damage is $500," and then being told, "You will have to cut it to $200." Naturally everybody puffs his damages, and when you settle with those fellows you will get less than you ask for, but somewhere near what you think you ought to take.

There is one company in Plymouth County that will not make any settlement. They are going to try everything out. They want to pile up a cash reserve, I imagine.

MR. SARGENT.—I would like to ask Mr. Carpenter if he has anything on the number of cases finally disposed of except by trial.

MR. CARPENTER.—Yes. They are all in the statistics. I don't carry them in my mind. They run 17,000 or 18,000 a year. I don't mean your 33,000 are going to be tried, or ought to be tried, but they do clutter up your docket. If you have 33,000 ahead of you, your case is not going to be settled quite as quickly.

MR. VIELE.—In connection with the immediate discussion may I ask that a word be said by those who do know the subject as to whether this State fund contemplates that payments will be made for damages as they are, for instance, by the Workmen's Compensation fund in New York? Are certain commissioners going to pay damages without suit in court?

THE PRESIDENT.—Let Mr. Grinnell answer that. He is on that commission.

MR. GRINNELL.—No. The State fund plan, that is the initiative plan, is not a State fund plan at all in the sense that the State is

behind it. It does not provide any commission or Workmen's Compensation plan at all. It is simply transferring to this fund, this incorporated fund, the monopoly of insuring up to five and ten thousand dollars every car in Massachusetts against liability under the present system of liability. You would sue just as under the present law. Instead of being defended by your lawyer and the insurance company, you would be defended by a lawyer picked for you by the State, and the rest of it would be just the same. The fund would be an insurance fund collected through these flat rates, and if the flat rates were not enough, the only way of getting money enough to pay the judgments would be by raising the rates for the next year to be paid by other automobile owners who would make up the deficit in previous years. The compensation plan has not yet materialized. It is still being studied. There is a good deal of discussion and argument in favor of it, but so far as working it out in detail is concerned it has not yet been carefully worked out under any general plan. The "State fund" plan has nothing to do with that. It simply transfers to this fund created by the State a monopoly of part of the insurance business, up to five and ten thousand dollars, so if you wanted to carry 10,000 and 20,000, or 20,000 and 40,000, instead of five and ten thousand, you would have to have two lawyers, one picked for you by the state and the other picked by the private company or by yourself, and then they might disagree on how the case should be conducted, and the Registrar of Motor Vehicles would have to investigate your case for you.

JUDGE KEYES.—I suppose the initiative bill is fairly described as one that transfers the defence to a politically appointed lawyer, just as the prosecution of criminal cases is now in the hands of the District Attorney.

MR. GRINNELL.—Of course, Mr. Goodwin would not assent to the statement that the lawyer would be a politically appointed lawyer.

JUDGE KEYES.—But a publicly appointed lawyer on a salary, rather than members of the bar selected.

MR. GRINNELL.—Whether he would be on a salary or not, he would be a lawyer chosen by this board of managers for this fund. And one of the peculiar things about that bill is that the Registrar of Motor Vehicles is saddled not only with the job which he now has to do of revoking and suspending licenses, but he would have to take over all the civil liability of all the sixty or seventy insurance companies today. That has to be done by him. He would have

power to settle claims over the heads of defendants, whether they are groundless or not, and to defend them, and if they did not pay promptly a fellow would be liable to have his property attached.

JUDGE KEYES.—Isn't it a direct attack upon the members of the bar appointed as defendant's counsel? Doesn't it amount to that?

MR. GRINNELL.—Well, they may have an opportunity to be employed by the state.

I do not want in anything I have said, gentlemen, to imply that the Commission has suggested anything affecting the right to jury trial. Sometimes, if any suggestion is made about jury trial, it is assumed that there is an attack on the jury system. Every now and then you will find somebody writing an article in some magazine saying that the jury system ought to be abolished. I have never taken part in any such suggestion, and nobody that I have been connected with that has said anything about jury trial had any sympathy with the idea of abolishing jury trial. The only purpose of any of the suggestions of the Judicial Council or this Insurance Commission, made in connection with jury trial, has been that the right to jury trial, which was created for the purpose of providing a trial, is being used in a way in which I do not think it was intended to be used. It results in this accumulation of cases and the delaying of all other business,—as Mr. Carpenter says, the turning of the Superior Court to a very considerable extent into an automobile court. That may be all right,—there is no harm in trying those cases, but there is some other business in the Commonwealth besides automobile cases. Since these automobile cases are producing such very small verdicts when they are actually tried at great expense to the public and to the litigants, it seems to me as though in the course of time economic pressure would force the bar and the bench and the community to work out some quicker and less expensive method of settling these disputes.

We do not know what the cost of the administration of justice is today. The only figures I know of in regard to that are the figures which we gathered together in the Judicature Commission's report of 1920, and it was something like six or seven million dollars. Since then the jury fees have gone up from three to six dollars. The jury cost has therefore doubled for the counties. Take the one item of service of writs. With 30,000 cases a year entered it costs approximately $4 a case to get service, at least, in the Superior Court. There is $120,000 going into the pockets of the deputy sheriffs. Now, that is all right for the deputy sheriffs. One

of the most significant facts in the report of the recess commission on county salaries is the fact that the recess commission, although it asked for the amount received by deputy sheriffs, did not get an answer from a single deputy sheriff in the Commonwealth, and the commission recommended that nothing be done until they got those facts.

Now, of course, it would be cheaper and probably a very much more effective and just method of service if every writ in the Superior Court were served by registered mail at a cost of eighteen cents as it is in the small claims court. I think you would get a very much more just method of service than the present ridiculous method of service at "the last and usual place of abode," where the thing may be stuck under the door or through the window and nobody ever get it at all. It is not very common, but, nevertheless, the number of cases which have been presented to insurance companies for the first time, in the form of an execution that they were asked to pay, is larger than it ought to be. One lawyer in Worcester told me that it happened to him three or four times, and he knew another man up there that it happened to about a dozen times. There may not have been anything fraudulent about it necessarily, in the sense that anybody deliberately withheld the thing from the insurance company so far as the service was concerned, but it was possible for the defendant to have moved and for the service to have been at "the last and usual," where he never got it, or on the Registrar of Motor Vehicles, by whom it was forwarded and never reached him. But when you have cases of a company being expected to pay a judgment of $4,000 when they did not have an opportunity to say a word in defending anybody, that goes right into the insurance rates and results in their increase. So that all I say about jury trial is that from the figures, from the results, and except for the purpose of an additional club in negotiation of settlement, the jury trial is not functioning as a jury trial. It is functioning as a weapon in negotiating a settlement, and if that is all right, why, it is all right, but I am not convinced that it is all right. So that with this accumulation of jury cases, with the business litigation being largely excluded from the courts, I think you will agree that business men think that the courts and the bar are ineffective in the way in which they do business, with the amount of delay, and so on, and it does not seem a very satisfactory condition for the administration of justice to be in.

How this matter is to be solved I do not know, but in this insur-

ance report the proposals, for instance, for the increase of entry fees, are offered for what they are worth. I do not know why litigation should be the only thing which has remained at the cost that it was in 1880, while the cost of everything else has gone up. I do not see any particular reason why it would not be fair to charge five or six dollars for an entry fee with a graduated scale for accidents if measured by the *ad damnum*, as we have suggested, and I remember Chief Justice Bolster at some bar meeting some time ago said that he thought that the bar attributed too much importance to the rules of evidence and that they might develop the practice of trying jury waived cases before a judge without the technical rules of evidence, and they could get along better than they thought, and try more cases, and have a quicker turn-over, than they have with the long-delayed list of jury cases.

All these things are suggested not from any doctrinal point of view, but as an effort to think out a solution of a problem which seems to be coming more and more to the front. In the last twenty years I think an increasing number of the public who are not lawyers are taking an increasing interest in the administration of justice, and I think most of them think it is a mess, and when people go into a court room there has seemed to be an impression that they have got to do a lot of things no sensible man outside the court room would think of doing because it takes so long, etc. I do not say that I agree to that in every respect. There are some things done in the court room which are reasonable, of course, but I think there is a good deal that is not adapted to the present business needs of the community.

It has been suggested, for instance,—and it might be a thing worth considering,—that in the matter of the reduction of cost you cut the jury in half, reduce the jury to six. There is a good deal to be said for that. Mr. Carpenter had a suggestion which none of us have acceded to thus far, in which I think he has had two or three supporters, for a plan that two jurors should sit with a judge in these automobile cases in an advisory capacity that might be worth trying. Thus far his suggestion has been met with contempt. There may be more in it than we think.

As I have already mentioned, the suggestion has been made for juries of six in the District Courts. I do not see how it would get us any farther ahead. There are other suggestions which have been made. There is the opportunity that has been put on the statute books for a jury waived hearing without the rules of evidence, with-

out any technical rule except the right to appeal on questions of substantive law. I have the impression that in course of time that form of trial is going to become more and more used. Whether it will take five or twenty-five years I do not know, but I cannot believe that the present insistence on jury trial as a method of settling disputes in the modern world, with all the business pressure,—I cannot somehow believe that that is going to continue indefinitely. I do not mean to say that jury trial is going to be given up, but I feel that the resort to jury trial and claiming a jury trial in every case, or in a very large proportion of the cases of relatively small amount is a system that is not going to continue indefinitely, if the interest in the business aspect of the administration of justice continues to increase on the part of the public.

Anybody who has followed the Bar Association literature and discussions, and so on, for the past twenty years will see that. The fact is that there is a continued increase of the interest of the public in the administration of justice. If anybody has got any practicable, workable plan on this question, the Judicial Council will be delighted to have it submitted to them, and I think the Legislature would, too. The Council is anxious to have suggestions from any individuals or from any committees of the bar. A study of the cost of administration of justice both through the tribunals and clerks' offices, and an estimate of the cost to the individuals outside of the courts, such as the expenses of litigation, whether in the form of charges for services or otherwise, would be an illuminating thing. You could probably produce a figure that would be startling to a good many of us.

MR. NUTTER.—It is only fair to say in regard to Brother Carpenter's plan, if I understand it rightly, that it is in complete use in Norway where a judge is assisted by two laymen in the trial of ordinary commercial cases, and I understand they do that up in Vermont.

MR. DANGEL.—I wish to say a word in connection with this jury of six. A few of us were instrumental in filing a bill with the present legislature to establish a jury of six, and in presenting it to the legislature Mr. Mahoney, who had charge of it, made a thorough investigation of the New York situation, and he found they had a jury of six in the lower court. They have one-third of the number of lower court judges that we have. They try in greater New York twelve times the number of automobile cases that we do, and they get a trial within six months. Now, it seems to me that the jury of

six takes in about everything that you are trying to accomplish in this way. First, you are trying to utilize the District Court judge, and the present District judge, as we all know, is glad to hold court for about an hour and a quarter in the morning and then get out to his private practice, either examining titles, or something else. And with all due respect to Brother Thorndike on the right, the trial of cases in district courts, whether in Brockton or elsewhere, usually results in automobile cases in about $1.25 for the plaintiff, if he gets anything.

The idea as I see Mr. Mahoney's bill is to separate the fact portion of the finding from the law part of it; in other words, separate the two functions. And most of us lawyers would be glad to get into court, even in the lower court, if we knew that the Judge of that lower court could take charge of the law and let a jury of six take care of the fact end.

Another portion of that plan is that in these towns and counties where the Superior Court goes you settle cases, and as Mr. Thorndike said, down in Plymouth there should be a trial by jury. Take the Cape—if they wanted to have a week or two when they were going to have juries sitting in the lower court, they could get rid of those cases. This jury system of six is not only in New York, but I understand in about a third of the states in this country they have this lower court jury of six, and it works well. Some of them have a jury of four, some of them have a jury of five, but it is, at least, a thought that is entitled to more than slight notice, and we ought to go into it a little more thoroughly.

MR. GRINNELL.—How would that affect, do you think, the business of the district courts, the present business of the district courts?

MR. DANGEL.—I should imagine that the district courts would be busy, at least, two days a week with automobile cases, and they would stay right there. In other words, a man would have no right to appeal if he got his final trial on the facts there, just as he does now in the present district courts.

MR. GRINNELL.—Well, that would only be so in some counties, wouldn't it? In the larger cities you would have to enlarge your courts probably, wouldn't you?

MR. DANGEL.—Enlarge your court house, you mean?

MR. GRINNELL.—I thought you would also have to enlarge the courts. For instance, take the central court of Boston. They could not handle jury cases in Boston.

MR. DANGEL.—I am not thoroughly familiar with it, but it seems to me you have at least a third of the judges laying off all the time in the Municipal Court of the City of Boston.

MR. GRINNELL.—A third of the judges laying off all the time? You mean because they are sick?

MR. DANGEL.—No, I don't mean sick. I mean for reasons probably of their own. Probably some of them have made arrangements with the Chief Justice. But let us take the situation there. You have two criminal courts, sometimes a third down on the first floor. The third is usually also a warrant session, and that judge operates only in the morning and probably hangs around the lobby a number of hours in the afternoon. Then you have anywhere from three—maybe Judge Brackett can tell more about this than I can—you have anywhere from three to six, sometimes seven justices, including two or three specials, taking care of the civil end of the business. That it seems to me does not comprise more than two-thirds of the court, if it comprises as much as that. How many judges are there?

JUDGE BRACKETT.—Nine regular judges and six special; fifteen altogether.

MR. DANGEL.—And that is when you are working at a maximum, but you will find usually on Thursdays and Fridays you are not working at a maximum.

I want to say another word in connection with what Mr. Carpenter said. Judge Whiting told me when he got through last year taking care of the Superior Court list, that the cases had got down to seventeen months from the time of entry to the time of trial in that end of the court that takes care of the automobile cases, and that undoubtedly there would be a marked improvement because things were shaping themselves up so that the time would be shorter. Now, on the other side, where you try the contract actions you can get trial in two or three months, and I don't care whether it involves ten million dollars or a small amount, if you make your affidavits and get your case in shape. And even now on the part that I will call the automobile side, where the tort cases are tried, the general jury list, if under this new statute that has just been enacted you merely waive your right to ask interrogatories except such as are allowed by the court, you then become eligible to go on the special list, so that I daresay you would get a trial in three or four months if you wanted it. The Superior Court list and the general jury session to my knowledge, have broken down three or four

times since last October for lack of something to do, not for lack of cases on the list, but because they could not get lawyers to try them.

JUDGE KEYES.—I hold no brief for the district courts, but I would like to point out to some of the gentlemen who seem to think that the plaintiff could get no look-in in the district courts, that I am on the other side of the matter. I represent several insurance companies, and there is one district court in this Commonwealth that we will not go near.

MR. THORNDIKE.—What is that court?

JUDGE KEYES.—I am not telling you. The moment a writ is brought in that court, it is promptly removed. We will not try either a property damage case or a compulsory liability case in that court, and do not; and I do not think I am alone in directing that for the insurance companies that I represent.

MR. MCCLENNEN.—This is not the Concord court, I take it?

JUDGE KEYES.—No.

THE PRESIDENT.—Well, now, gentlemen, what is the point of all this discussion? Are we going to do something, are we going to make some recommendations or are we just going to talk and do nothing about it?

MR. NUTTER.—Mr. President, isn't it a practical question? We can't go on the way we are doing now, in view of the figures that Mr. Carpenter gives. We are going to have either one of two things. Personally I think, whether you like it or don't like it, you are headed toward a compensation board. Not only in New York is this committee appointed, but Mr. Drinker's committee of the American Bar Association had a compensation board act, had a compensation board act drawn for that committee on these tort cases to report. I was on that committee, and I told him I would not agree to it, and so I filed a minority report, and he left it off, or, rather, he simply said it was his own personal opinion, but in consequence of the recommendation of that Committee I understand the American Bar Association will have a committee on a compensation board. Now, if we want to avoid a compensation board, we have got to do something, and we have got to do it in an experimental way, and I cannot see why the experiment that the Judicial Council suggests is not on the whole the best one to try first. It may not work, but we have got to try something, because if we do not I think we will be in a compensation board within a very short time. And as far as civil cases are concerned, of course there is a big push all the time for arbitration, and unless we can get the courts cleared and also

have cases for arbitration arbitrated in the courts, that is going to take all of the business out of the Superior Court on the contract side.

MR. GRINNELL.—We have received so far suggestions worth considering at previous meetings, and I think we have received them now. I think the explanation of Mr. Dangel of the jury of six is an interesting one which is worth considering. I am not satisfied as to how it would work here, but I think if anyone has any suggestions it is helpful to everybody to have them aired here, and it is more important to have them aired in discussion than it is to take any particular vote which in a meeting of this size would be of no particular consequence. I hope if there is anybody who has any suggestions, that they will make them.

MR. NORTON.—Could we have the sense of the meeting on the suggestion as to the temporary appointment of District Court special justices?

THE PRESIDENT.—Does anybody wish to make a motion to that effect?

MR. NORTON.—I move that the sense of the meeting is in favor of the suggestion as to a temporary appointment of special district judges to try motor tort cases to a jury.

[The proposed was approved.]*

Now, do you want to do anything about what Mr. Hayes talked about? I think we might make Mr. Hayes a committee of one to suggest an amendment to that compulsory insurance law steering clear of the property damage part, and just broaden the bodily injury enough to take in the necessary expenses that go with the bodily injuries, if the meeting wants to take any action on that.

MR. BAILEY.—I will make a motion to that effect.

[The motion was seconded and passed.]

THE PRESIDENT.—Mr. Hayes is appointed a committee of one.

MR. MASON.—I might suggest we will have to be very careful that he does not include attorney's fees in that.

MR. MCCLENNEN.—Mr. President, Mr. Grinnell speaking about the advisability of suggestions leads me to refer to this, not that I hope for any action on it, but I think it is theory that might be worth considering with a view to the future. We have several diffi-

* The substance of this plan recommended by the Special Commission on Motor Vehicle Insurance, was reported favorably by the Judiciary Committee of the legislature as House No. 1152 but was defeated in the House on recommendation of the Committee on Ways and Means, because of the expense involved for additional jurors and other overhead cost of more jury sessions.

culties, some procedural and some substantial, that this bears on. At present there is a feeling that automobile liability insurance costs too much because of the insurance overhead, the selling expense that might be rendered unnecessary. There is a feeling that there is no reason why a man who is properly on the highway and has a valuable automobile smashed up by the negligence of somebody that the state has licensed to go on the highway, should not get actual compensation just as much as if he had some physical contact and his disposition hurt. There are some substantial features.

Then there is the procedural difficulty that we have at present. This is not an attack on the jury system for the trial of real issues that ought to be tried before a jury. It is the suggestion of a method of avoiding the use of that tribunal for the ordinary ruck of cases that do not involve any substantial question that ought to be tried.

Now, those are the things to be accomplished. If we could provide that no one should be permitted to register an automobile without not only the registration fee that is paid now, but a sum to be worked out by actuaries that would provide a sufficient amount to cover the damages done by automobiles, so that persons injured would have in the hands of the state a sufficient amount of money so that those who are entitled to recover would know that they could recover, then we could properly provide a substantive law that a person who operated a registered automobile with the approval of the state on the highway should not be liable to the person injured by the operation of that automobile, but that the state which has permitted that automobile to be operated should be liable for the damages done by the improper operation of an automobile to a person who was in the exercise of due care. That would be a claim against the state to be presented and approved before some appropriate official of the state, whom we may call a claim agent for the state, and if the claim was not approved the state would then be sued in a court of claims for the amount of the damages. The state would be sued only in a court of claims, and with such functionaries of that court as the state consented to have.

We would have in the district courts and municipal courts potential courts of claims, and the legislature could make them the courts of claims that would hear those cases. The person injured would be sure of having adequate compensation for his injuries.

I very much question whether, if you follow it by and large, the amounts that have been allowed by single judges in legitimate

cases have averaged smaller in proportion, to what I will call the value of the cases, than the amounts allowed by the juries. I know some who think if they have a good case that they would prefer to take the chance of getting an adequate allowance from a judge rather than from a jury.

If we put such a system as that into effect, you would have these features. You would save the selling expense, the overhead expense of insurance. You would save the much larger item, the amount that is now paid by insurance companies on non-meritorious claims that may be made seemingly meritorious by the arrival of an unexpected witness that would not be so apt to prevail with his testimony before experienced judges as he might be before juries whose experience in weighing evidence is limited to a short period of time. You would have that great saving of expense. You would have the fund, or those administering the fund that is going to pay the damages, not hampered in making legitimate settlements by the apprehension of what will happen to them if they come right up to the scratch in naming their figures for settlement of the difficult cases.

You do not find a great deal of difficulty generally in getting prompt settlements from fire, life and accident insurance companies for claims that come within the terms of their policies. You find many insurance companies who recognize their liability and want to meet that liability promptly as a matter of good business, and many of those companies are being held back today from proceeding in that straight out business-like way by the apprehension that they have of the consequences to them in the flood of unmeritorious claims that come in just as soon as it is thought an insurance company is easy. You get those substantial savings in the matter of insurance cost.

In the matter of administration of the courts you would get the great saving that would come from the expensive jury trials in a great flood of cases that do not really merit trial. Not only would you have the saving of expense in the administration, but you would remove this serious congestion in the courts that is now blocking the legitimate treatment of the automobile cases, and at the same time blocking all the other litigation.

I would be glad if you would think that over. Perhaps at some future time there may be something that is worth doing about it.

THE PRESIDENT.—And the judgment would be payable out of this fund to which the motorist contributes when he gets his license?

MR. MCCLENNEN.—Yes.

JUDGE KEYES.—What would you do when the motorists go across the state line? The motor vehicles have obliterated state lines, practically.

MR. MCCLENNEN.—Well, the state has simply taken away the common law liability of that operator of a Massachusetts automobile. The state, of course, would not assume the liability of a motorist from another state unless that motorist wanted to be licensed in Massachusetts and pay for his exemption from liability, which would be open to him if he wanted to come in.

MR. MASON.—That plan would entirely do away with jury trials in automobile cases?

MR. MCCLENNEN.—That would do away entirely with jury trial in automobile cases.

THE PRESIDENT.—Is the Court of Claims a new court, or are you going to use some of the district courts?

MR. MCCLENNEN.—Well, this is very fragmentarily thought out. My thought was to take the existing municipal courts and district courts and make them courts of claims.

MR. GRINNELL.—The jury trial would be eliminated under that plan, because you would abolish the liability?

MR. MCCLENNEN.—You abolish the substantive liability. You do not take away jury trials.

MR. CINAMON.—It occurs to me that the reason for the congestion in the Superior Courts is the inducement which leads lawyers to enter their cases there, and if we could remove that inducement so that the present district courts could be utilized without the hazard to the litigant attendant upon the present condition of the district courts, we would remove the congestion in the Superior Court, and in line with that thought it occurs to me that if we could supplement Mr. Dangel's and Mr. Mahoney's small jury idea of six in the district court by adding to it a system of a circuit court which would do away with the possibility of favoritism in the district courts which I have heard spoken of at various meetings, and in addition to that empower that circuit court while it is sitting with a small jury, to advise that jury on the facts, that might help to solve the problem.

I think as a whole Massachusetts and other states are making a mistake in depriving the very man on the bench who is most capable of advising on the facts of that right.

On the other hand, if you have a small jury in the district

court, if you have a circuit judge who would not be subject to any local prejudice, if you have that judge with the right to advise, not to direct but to advise that small jury on the facts, you would remove the fear which we as lawyers have for the district court that induces us to enter our cases in the Superior Court and claim a trial by jury. And those fears that we have have been ably expressed by Judge Thorndike. We are afraid that our plaintiffs' verdicts or findings in the district court will be inadequate. That is one of the inducements for entering our cases in the Superior Court, and we are afraid of the bias of a single man about the facts which he tries.

Incidentally, we are also afraid to go into an outlying district court, because the judge, being only a human being, may be inclined to favor the local man who is constantly appearing before him. So you would eliminate the prejudice of the locality by a circuit, you would eliminate the congestion in the Superior Court because you give the plaintiff his jury in that jury of six, and you would obviate the mistakes by allowing the judge, who would be a circuit judge, to advise the jury before him on the facts.

That experiment, instead of taking fifteen or twenty district court special judges from their courts and putting them into the Superior Court to try with a jury of twelve, simply brings the cases into their courts. You would have the same effect, except that you would have 140 odd judges to hear those cases instead of fifteen additional ones. The added advantage of that would be that all these district courts have their court rooms and court houses, whereas if you remove them into the Superior Court you would have the crowding for space as well as the additional burden, as I have said, of your twelve jurors.

I offer the suggestion in response to Mr. Grinnell's request for it.

MR. NUTTER.—I don't see why Mr. Dangel's idea of six could not be made less. Now, as I understand the situation, it is that you want to introduce on questions of fact a fresh lay mind in the conclusion so as to overcome what Judge Thorndike feels is the somewhat stereotyped way in which district judges may look at the thing. Under those circumstances why wouldn't two or four be just as good? You would get that element, and the fewer you have, as long as it supplies the element of a fresh lay mind, which is what I understand is the essence of it, the fewer you have, why, the less

trouble the administration would be and the cheaper it would be as far as that is concerned.

MR. MCCLENNEN.—These remarks about these district judges, who are in the minority here present,—

MR. THORNDIKE.—I am not a district judge, so that does not apply to me.

JUDGE KEYES.—I am not going to be.

MR. MCCLENNEN.—brought to my mind that old story that some of you may not have heard. Mr. Durant found that a case was coming up before his father-in-law, Judge Aldrich, and wrote to Mr. Russ, who was on the other side, saying, "I find this case is coming up before Judge Aldrich, and therefore I think I will retire from it." Russ, not knowing the situation, wrote back and said, "If you want to retire from the case you can, but I will take this occasion to say that I hate the old fool just as much as you do."

MR. GRINNELL.—As to Mr. Cinamon's suggestion, would that involve scrapping the present district courts and substituting a circuit system? Because otherwise how would you appoint your circuit judge?

MR. CINAMON.—Keep the same justices, but move them about as they do in the Superior Court at the present time.

MR. GRINNELL.—So that they would not sit in their own communities?

MR. CINAMON.—Exactly. That is exactly what I mean.

MR. GRINNELL.—How that would work as a practical matter in the administration of the district courts, I am not clear.

MR. THORNDIKE.—It would be welcome.

MR. CINAMON.—Well, we have no difficulty in working out a situation in the Superior Court along those lines. You have them under one Chief Justice. You have them moved about just the same as you do in the Superior Court, or you could abolish the present district courts as such and recreate them as a circuit.

MR. GRINNELL.—Well, that, of course, is a suggestion that has been made for some forty years, but where it is attempted the hair of the local courts and the local bar and the local communities stands up on end, and I do not think the demolition of the local districts is in sight as a practical possibility as far as I have observed. Take the situation right here in Boston. It has been suggested for forty years that the Boston courts should be centralized and that they should circuit about in the various court houses, but that idea has

never got anywhere. I suppose it would be perfectly possible to use the present court houses within Boston, which are very expensive and to some extent not used now, and I suppose the Superior Court could use those now for some of their sittings, but the difficulty with centralizing these courts is that the local communities do not like the idea so far as we can observe. I think the suggestion is interesting. How far it is practicable to work it out I am not clear. I am very glad you made the suggestion.

MR. CINAMON.—I don't know of a single case that I might try where I would not prefer the judge to be permitted to tell the jury what he thinks about the facts.

THE PRESIDENT.—Do you think it is going to be easy to get the legislature to change the statute so as to allow a judge to charge on the facts?

MR. CINAMON.—From experience I don't think it is going to be possible to get the legislature to change anything that has existed for years.

MR. GRINNELL.—As a matter of fact, the legislature has taken some pretty radical steps in the last few years.

MR. CINAMON.—Due to insistence on the part of the Judicial Council?

MR. GRINNELL.—No. Before the Judicial Council came into existence, and partly because of some suggestions of the Judicial Council too, they have increased the jurisdiction and a number of other things. We don't expect quick results from the legislature, but I don't think the legislature gets as much credit as it is entitled to for the things it does not do. Anybody who has followed the things that it is asked to do I think appreciates that fact, and I do not join in the common condemnation of the legislature. Take this whole matter of rule making. The courts have got a good deal of rule-making power now. They have never used it very much, or as much as they might use it. As a general thing some people think rule-making power would be a good thing, and some people think it would not. I think the Judiciary Committee of the legislature takes a good deal of interest in these things, but they do not sympathize with some of the less understood things particularly relating to jury trial. I do not think they are to be condemned for not taking an interest, because I think they have shown a good deal of interest.

MR. HAYES.—Mr. President, I want to make one suggestion in answer to this last recommendation. There are three of us sit-

ting in two courts in Franklin County. I think Judge Keyes will bear me out in this. I know very well the attitude of our judge, who has been asked many times by our bar to be a candidate for the Superior Court, to answer a question that has been pending for a good many years. His answer has been a good many times, "Well, I don't want to travel, I don't want to leave home and my family. I would rather stay where I am." And I think that there would be a good many judges who would not want to give up their present situation and become circuit judges and start travelling throughout the Commonwealth of Massachusetts. I know that would be the condition in our own court, because that has been the objection each time it has been brought up. I think it would mean that you would create an entirely new court if any such scheme as that was tried to be enforced. I don't think that under the present plan you could turn it into a circuit court.

I thought I would leave this suggestion with you too, so that you would have it. I don't know whether you are aware of the fact that the County bars of Western Massachusetts are acting on the things that we are talking about today independently. Several of the County bars of Western Massachusetts within the last three or four weeks, by themselves, and aside from this organization, have had meetings and are going before the legislative committee that held a public hearing in Springfield last week, and aside from this organization their point of view seems to be that if it is a fact that about 85 per cent of the present Superior Court business is made up of automobile tort cases, that if it was going to wind up ultimately where it has been suggested, in a compensation board, the result is that 85 per cent of the lawyers' business in the Superior Court will probably be lost, and under a defensive policy the bars out in the western part of the state are acting by themselves, that is, in independent units, and sent delegations this last week on the theory of defending their own ways of making a living and for fear that such a thing as has been suggested might happen. I don't know whether the officers of this organization are aware of that or not, but it is true.

MR. DANGEL.—I just want to say another word in answer to the last speaker. It might also be interesting for him to know that there was a joint meeting of the representatives of various bar associations held about two weeks ago, up at the University Club, and Mr. Lawler of Greenfield represented the Franklin Bar Association, together with Mr. Sherman of the Franklin County Bar.

MR. HAYES.—Yes.

MR. DANGEL.—And I think it was a meeting from which the representatives of the different bar associations went back to their bodies and told them what the story was. We had Mr. Downs there, and between Mr. Downs and Mr. Grinnell it seems to me the ground was thoroughly covered.

As long as Mr. Grinnell has asked for suggestions, I want to change the subject for a minute and ask if it would not be possible for the Judicial Council, if it is within their province, to define what the practice of law is, so that we can go into the legislature with a comprehensive definition. I know it is a large order, but it is an order that is imperative at the present minute, because competition in the practise of law is coming not only from the banks, but from every employee of the banks, together with the collection agencies that are allowed to do all those things that lawyers are not allowed to do, and are allowed to indulge in all the practises that lawyers are not allowed to indulge in. Those things have created a condition in the bar, not only of this Commonwealth but elsewhere, that seems to me to be very serious, and if once and for all we could get a definition passed by the legislature that was wide enough so that all the bank clerks would not be advising a man how to draw his will, and later on drawing it up, and still later on probating his estate, and then seeing that the banking institutions were getting that which always has been a legitimate part of the law practice, the situation would be greatly improved. And if collection agencies—although I think we are on the road to that, I think that one bill has practically been assured of passage—if the collection agencies are limited, they would be collection agencies as their names indicate they are, instead of really getting claims which amount to a thousand dollars or more. You would not believe that any firm would send an ordinary collection agency a claim of $130,000, but that has been done, and if we could get the Judicial Council to give us in their report a comprehensive definition, and get the legislature to put it through, I think the bar would be benefited.

MR. NUTTER.—Well, I can say that the Bar Association has struggled with a definition for years, but nobody has ever been able to make a definition that would stand very long.

MR. DANGEL.—I have, I believe, about three or four hundred citations with figures, but it won't do any good.

MR. NUTTER.—I want to say one word about Brother Hayes'

suggestion that they would not want to travel. There is no particular objection that I can see why there should not be a district that each would travel within the county, or several counties, or as long as you could get them from one place to another in a car which might be provided at public expense, because Brother Ford has got it down now where they could get a car very cheaply, and you would employ the judges for their full time. When the Judicature Commission looked into it we found a most extraordinary difference in the work. In one district the work of one judge went on for an hour or two, and another again would hardly be able to finish it working much longer. So you would have full time occupation, which it seems to me the judges ought to have.

MR. GRINNELL.—The suggestion was made to me the other day that we might have a few flying justices, so to speak, such as Judge Mack, the flying Federal judge, who sits in various places, so that the suggestion Mr. Hayes made is a very practical one. You would probably have to pay judges a good deal more if you are going to make them travel around the state, and I was wondering whether the bars in the other parts of the state had made any definite suggestions in regard to the matter. I was aware of the fact that they were rather apprehensive as to the approach of this possible compensation plan, and I think it is a very good thing that they should realize the approach or the looming up of that plan, because I think it will make the bar think about the whole problem more. I wondered whether there had been any practical suggestions which they advanced, or whether it was merely in opposition to the doing of anything. I think one of the difficulties in this Commonwealth has been that we have not tried experiments enough in the last forty years, and that the bar as a whole has been rather inert in that way.

MR. MCCLENNEN.—One of the features that has made so-called flying judges in the Federal service so successful would not apply in Massachusetts. I understand it is common in that service that the Alabama judge could sit in New York in July and the Connecticut judge in Mississippi in January.

THE PRESIDENT.—One of the things I intend to do, Mr. Hayes, —and I thought I would have it done before this,—is to have all of the bar associations throughout the state connected with this association in some way. I got the names and addresses from the secretary some time ago, and it was my intention, but for other things that interrupted, like the Reading case and some more mat-

ters, to have a luncheon of representatives of all the various bar associations in the state, and have them take back to their associations some kind of a plan whereby delegates would be appointed to this association, so that we would cooperate. That was one of the things that Mr. Hughes did when he was connected with the New York Bar Association, and the first step that he took was to coordinate all the local associations with the state association, and that is one of the things that we have in mind, and which I thought before this meeting, would have been in operation, but we hope to get that going soon.

Is there anything else?

If there is nothing else, the meeting stands adjourned.

F. W. GRINNELL,
Secretary.

AN APPRECIATION OF CHIEF JUSTICE PARSONS BY A LEADER OF THE NEW YORK BAR.

The following extract from a letter of Mr. John G. Milburn is worth preserving as an appreciation of the debt of the American bar to Theophilus Parsons, Chief Justice of the Supreme Judicial Court from 1806–1813 and the great initiative force in the beginning of the modern administration of justice in Massachusetts.

NEW YORK CITY, October 28, 1929.

MY DEAR MR. ————:

One of my real pleasures of the summer was the leisurely reading of the Memoirs of Chief Justice Parsons which you kindly sent me. I felt from beginning to end that I was in the presence of a very powerful personality in a very interesting environment. I envied the young men who sat around him in his office listening to his expositions. It reminded me somewhat of my own earliest years in a country law office nearly sixty years ago, though my mentor was not a Theophilus Parsons.

I see clearly now the source of the style of the Massachusetts reports. The evidence is conclusive. He was appointed Chief Justice in 1806 and the first volume of the Massachusetts reports was published about that time. Prior to that time your judges did not hand down written opinions and there was no reporter. His period of service covered about seven years and the first ten volumes of the reports. It is said in the Memoirs that from near the beginning of the second volume to the end of the tenth his opinions fill the bulk of the volumes. His was the powerful and controlling mind in the court. He was a profound student and "learned in the law". He was noted for "compactness and condensation" and depended on sound reasoning rather than a parade of cases and citations. He deeply appreciated sound pleading which is to my mind proof of a legal mind and clear thinking; and his influence on the jurisprudence of the state was recognized by his contemporaries. Bagehot says in his "Physics and Politics" that he had heard that the founder of the *Times* was asked how all of its articles seemed to be written by one man and that he replied,—"Oh, there is always some one best contributor and all the rest copy". That is my case for the Chief Justice and the Massachusetts tradition against all the world.

Ever sincerely yours,

(Sgd.) JOHN G. MILBURN.

A SUGGESTION FOR OPTIONAL TRANSFER OF CERTAIN CASES TO THE LAND COURT.

The conveyancing bar in Massachusetts at the present time would be very much pleased with two improvements in the law.

First, they would like to be able to try in the Land Court a proceeding to quiet title *in rem*, the consequence of which would be as good as a decree of registration. It seems to the writer that such a petition to quiet title may already be brought under existing provisions of the General Laws. Some of us call those provisions the Nathan Matthews sections of the quiet title chapter because we understand that they were drawn by his great conveyancing skill. The reference is to General Laws, Chapter 240, Section 610. Those sections were first enacted in 1897.

Second, the conveyancing bar would like to try in the Land Court rather than in any other court any action which was clearly an action to determine the title to land. Such an action might be a suit for a declaratory judgment about a deed, trespass to try title, a bill in equity to quiet title, partition, specific performance, etc., etc.

None of those causes of action necessarily involves the title to land but it would be easy to examine any particular suit and decide that it was a good case to try in the Land Court. My suggestion is that all courts should have an option to transfer to the Land Court, upon motion, part or all of a case which really involved the title to land. I would go a step further merely to avoid useless docket entries and would provide that any such suit might originally be brought in the Land Court if the writ or bill was endorsed with permission to do so by a justice of the Superior Court.

The Land Court jurisdiction now covers not only registration but also writs of entry. Practically every issue which arises in a writ of entry may also arise in a partition suit. Some cases about restrictions belong in the Land Court and some in the Superior Court. Suits to quiet title belong in the Land Court if brought under the antiquated statutory provisions, Chapter 240, Sections 1 to 5. Determination of boundaries to flats is done in the Land Court. (Chapter 240, Sections 19 to 26.) A trustee who wants to know whether he may convey or mortgage may obtain instructions in the Superior Court or establish his rights in the Land Court. (Chapter 240, Sections 27, 28.)

Previously, as I understand it, the suggestion has always been that certain classes of cases should be compulsorily taken out of the Superior Court and put into the Land Court. And the same might happen with regard to taking partition from the Probate Court.

Now on the one hand any one who has had considerable experience in the Land Court knows that about every kind of a trial question bobs up there and gets well tried but on the other hand there are distinctively trial courts which are the Superior and Probate Courts and which should keep all cases suitable for them to keep and try. And the fact that any case relates to land may be of minor importance. Such being the situation, it would be reasonable to give the Superior or Probate Court the option whether to keep or transfer each cause, or part of it.

For instance, where partition is brought merely as a means of obtaining sale or division of property and no question of title is involved and two or three separate woodlots are to be set off to two or three separate owners or sold, there is no reason why a resident of Berkshire County should be required to leave the Probate Court for the Land Court. On the other hand, if acreage property were to be subdivided into city lots and the property to be partitioned were already registered land, certainly all courts would breathe a sigh of relief if the Land Court could handle the whole matter from the beginning.

With the foregoing notions running through my mind I have turned to the precedent which already exists for transfer of causes, I mean the transfers from the Supreme Judicial Court to the Superior Court and to the Probate Court. (St. 1922, Ch. 532, Section 1.) With that before me I have made the following rough draft to embody the ideas above expressed.

TITLE:—An act to provide for the transfer from any court of any case which is more suitable for trial in the Land Court.

SECTION 1.—Chapter 185 of the General Laws (this is the Land Court chapter) is hereby amended by adding thereto a new section to be numbered and known as Section 1(a) and reading as follows:

> "1 (a). Any court having jurisdiction of a cause pending before it which in its opinion is more suitable for trial in the Land Court may transfer such cause for partial or final disposition in the Land Court."

SECTION 2.—Section 15 of Chapter 185 is hereby amended so that it begins:

"Except as provided in Section 16 and Section 16A"

SECTION 3.—Chapter 185 of the General Laws is hereby amended by inserting after Section 16 a new section to be numbered 16A as follows:

"16A. In any cause transferred to the Land Court any matter heard and determined there shall be subject to appeal, exceptions or other proceedings in the nature of an appeal applicable if the case were originally brought in the Land Court. In any cause transferred to the Land Court, that Court shall have as to so much thereof as is before it all the jurisdiction and powers of procedure of the court from which the cause was transferred and to that end may issue all necessary writs of injunction and other writs applicable to any such transferred cause. Process issuing out of the Land Court in any cause transferred to it may issue and may be served either as in the court from which said cause was transferred or as in proceedings for the registration of title to land."

RICHARD W. HALE.

"TURNING THE LIGHT ON BANKRUPTCY EVILS" IN NEW YORK.

(Reprinted by permission from "Commerce and Finance", of April 2, 1930.)

The voluminous report submitted last week to Federal Judge Thomas D. Thacher by Col. William J. Donovan, counsel for the New York bar associations, in which he advocates sweeping changes in the Federal Bankruptcy Act, has again centered attention on the whole question of bankruptcy reform, which was so much before the public eye about a year ago. The report, in fact, comprises the results of an investigation begun early last year following disclosures of glaring malpractices in the principal districts throughout the country, especially in the Southern District of New York.

Colonel Donovan reveals that the administration of the bankruptcy law has been accompanied by intolerable delays, great waste and often shocking abuses. For the fiscal year ending last June, the number of bankruptcy cases was 57,280, assets realized about $89,000,000, while total claims of creditors amounted to more

than $883,000,000. One of the conclusions reached is that the average return to creditors during the past four years of experience with bankruptcy cases has been only about 8 per cent of their claims, with the inevitable result that in many instances creditors prefer to write off their losses at once instead of wasting time in fruitless efforts to "salvage something from the wreck."

The salient changes in procedure recommended in the report are:

Creation of the office of a Federal bankruptcy commissioner.
Appointment of licensed trustees.
Relieving the courts of administrative duties in bankruptcy.
Centralizing administration responsibilities in the executive branch of the Federal Government.
Abolition of receivers.
Immediate reference of cases to referee for appointment of licensed trustee.
Placing of administration on a businesslike basis.
Creditor control to be limited to those cases in which creditors have a genuine interest through recognition of creditors' committees.
Enforcement of criminal and discharge provisions of the National Bankruptcy Act.
Adoption of many administrative provisions contained in the English and Canadian system.

Judge Thacher does not specifically approve all the proposals made in the report, but he is equally urgent in stating his belief that the time has come for a drastic reform of the law. The New York Credit Men's Association promptly adopted a report approving the program advocated by Colonel Donovan. It has asked the National Association of Credit Men to assume the leadership in a drive to insure the introduction at the next session of Congress of a bill embodying the reforms asked. The Committee on Bankruptcy of the New York Credit Men's Association finds that the primary and fundamental defect in the administration of the Bankruptcy Act under the existing system is that the liquidation of a bankrupt estate is regarded by the law as primarily a legal problem and, therefore, one to be handled by judges, referees and attorneys, rather than a business problem to be worked out by business men. It concludes, however, that a Federal bankruptcy system is essential to the transaction of modern business and that the act in its substantive provisions is fundamentally sound.

While working for the necessary legal reform, it is interesting

to note what results might be obtained through the application of business methods to cases of business failure. A survey in a city near New York shows that out of 55 cases of business failure, 43 might have been obviated by practice of just the rudimentary rules of business. In this connection, the New York *Times* suggests that the bankrupt who continues or re-enters business should be given instruction on how to avoid his former errors. The *Times* says editorially:

> Credit organizations and trade associations might very well unite in a campaign to compel every debtor to pass an examination on at least the elementary processes of good business practice before he is again furnished with credit. A start might thus be made on the biggest problem in business today—education of the rank and file in trade and industry on correct operating methods.
>
> . . . even brief study will show that a simple catechism of correct practice might be drawn up for all retailers and in turn for wholesalers and producers. The fundamentals in these three branches are the same, and a knowledge of the fundamentals would be enough to save many a so-called business man who is now on the edge of failure.
>
> Credit agencies and organizations have long had an opportunity to introduce such a plan, but mounting bankruptcy totals should impel them and other trade bodies to make a start on it. The scheme might very well be extended to take in all creditors and to establish a class of "preferred risks" for those who can demonstrate that they are using proper control methods in their enterprises.
>
> In credit lines, as in discount terms, one is struck by the mechanical methods employed. Customers are lumped together—the good with the bad. The good customer may get some "breaks," but he is often paying for the other's mistakes, ignorance or trickery. He is like the careful motorist who must suffer a high rate of insurance to cover the accidents of the reckless. Sooner or later he should rebel and demand "preferred" treatment.

HIGHWAY SAFETY AND THE COURTS.

(An Address of Hon. Arthur P. Stone before the Massachusetts Safety Conference, April 30, 1930.)*

Law enforcement, it is claimed, is the first step in giving adequate protection on the highway. At the risk of being unpopular with the gentlemen who arranged this program I am going to assert that law enforcement is the last step in giving adequate protection on the highway. We are altogether too fond in America of talking about evils for some time, meanwhile doing nothing. Then after a certain amount of propaganda has been spread about the community we pass certain laws and consider the problem solved and when we find that the problem continues and that the evil complained of does not entirely disappear, we look with questioning eyes at the courts and ask what we make laws for if they are not enforced. Now I am going to make the radical statement that the courts are not created to enforce the laws. If they were they necessarily would have been given far more powers and you would have a tyranny which would be unspeakable.

Let us see how the law is enforced. The people of Massachusetts have decided that a person shall not be allowed to go away after causing injury on the highway without making himself known. I believe in that law but as a judge I had nothing whatsoever to do with the making of it. It was made by the Legislature because of popular demand. The people as a whole said that that is a wicked thing to do and their legislators, directly representative of the people, created a statute which declared it an unlawful thing to do and prescribed a certain punishment for it. After that statute was passed that particular act became a crime and the courts had nothing to say about it whatsoever. Suppose that a man does commit that offence. Nobody thinks of asking the court to do anything about it. A police officer takes the matter up and investigates. Under certain circumstances he makes an arrest without a warrant. Under others he feels compelled to go to a court but only for the purpose of getting a warrant to arrest. The court's function in granting this warrant has nothing to do with the en-

*Judge of the Third District Court of Eastern Middlesex (Cambridge) and Chairman of the Administrative Committee of the District Courts of Massachusetts.

The conference was under the direction of the Massachusetts Safety Council and the governor's committee on street and highway safety, and more than 500 delegates from all parts of the state, including representatives of local safety committees, traffic experts and police officials were in attendance.

forcement of the law. The court's duty is critical of the officer rather than helpful. In other words, the official to whom the application is made does not urge the officer on to make an arrest but requires the officer to show him that he has the right to make an arrest. In granting this preliminary authority to arrest the court is supposed to protect the individual against the government. The executive arm of the government is seeking to take into custody one of our citizens. Our frame of government has placed the judicial arm as a barrier between the individual and the government itself unless good cause is shown.

Do not understand me as saying that the court is in any way obstructing the enforcement of the law. What I do say is that its action is entirely negative and that it is not enforcing the law in any sense. The officer is seeking to enforce the law and the court is placed as a guard against action which is unjust or too zealous. Again when the man is brought into court the judge himself is not the active factor in the enforcement of the law. His duties at the beginning are almost entirely for the protection of the individual. The individual is entitled to be released on bail if the case is continued and that bail should never be used for punishment. A man accused of crime is entitled to be released upon furnishing security in the smallest sum which the judge feels sure will secure his attendance when he is next wanted. If a judge feels sure that $100.00 bail will secure the attendance of the accused person he has no right to impose bail of $5,000.00 because he would like to see the man put in jail before he is found guilty. Again the man accused is entitled to trial by jury if he wishes it and is entitled to a preliminary hearing in all cases before a judge. The government must prove its case against him without any help from him and it is the judge's duty to see that the government sustains that burden. He must in fairness be given an opportunity of preparing his defense and a reasonable time must be granted him for that purpose if he asks it. In fact, by our system of government up to the time of the final determination of guilt is made the judge is of necessity something of a stumbling block in the path of the executive arm of the government which has the duty of enforcing the law.

All this is elementary and you do not disagree with what is fundamental in our government. Nevertheless as a matter of practice people persist in ignoring this fundamental principle. I think it is fair to say that up to the last few years practically all the

endeavors to solve our automobile problems consisted in making laws which would punish the operators of automobiles and then looking expectantly to the courts. When such a course failed as it was doomed to fail the public cried for more and severer laws. Within the last year or two, due largely to such efforts, I believe as this conference, far more progress has been made and that progress has been made largely without legislative and judicial action.

Review with me for a moment in order to prove my position the experience that we have had in the matter of making the highways safe by operation of law. Speed, for instance, has always been one of the great factors in the dangerous operation of automobiles. Yet the public demands speedier cars and we are spending millions on through highways so that cars may be operated at higher speed. It is within the memory of everyone here when twenty-five miles an hour was considered excessive speed. Today there are highways I understand, although perhaps not in this state, where a minimum speed of thirty-five miles an hour is demanded. Now when the gentlemen of the Legislature said that to drive more than twenty-five miles an hour was a criminal offence it was comparatively easy for the courts. If the limit is twenty-five miles, twenty-six miles means guilty. But while this was easy for the courts it was not satisfactory to the public and definite speed limits were abolished and now you put upon the courts the duty of determining whether a rate of speed is "greater than is reasonable and proper" taking all the circumstances into consideration. I am not saying that this is not the better way to deal with the problem but I wish to point out to you that it makes the burden placed upon the court far heavier than it was before. It also increases the possibility of any one of us becoming a criminal. If I pick a man's pocket there is no doubt about my being a criminal. I can avoid being a thief by not stealing but if I am driving down Massachusetts Avenue the question of my being a criminal is purely a matter of judgment. I am doing no wrong in driving and I am doing no wrong in driving at a reasonable rate of speed. But if my view, however honest it may be, of what is reasonable does not coincide with that of the police officer who is observing me and later with that of the judge who hears the case then I am a criminal without intending to be one.

To see where this present doctrine of relying on the courts

leads us take the offence which is the subject assigned me. "Dangerous Driving." In the beginning "reckless driving" was the offence. Soon cases began to come into the court where the driving was careless and where considerable damage was done but the court could not say that it was reckless. A man may be negligent and careless and do damage to other people and yet be a benevolent person who would not willingly injure anyone. The public demanded that these careless persons who were doing harm upon the highways should be stopped. Accordingly the offence of driving so as to endanger the lives and safety of the public was created and again it was left to the courts to determine under all circumstances whether that was done. Now this offence is very general in its nature. Up to the time of recent legislative action all that was necessary to show was that the lives and safety of the public were in danger. The Supreme Court held logically in *Commonwealth* v. *Pentz* that this was the only factor. This lead to the amendment a little while ago by which the word "negligently" was inserted into this statute. At the present time, therefore, it is an offence to drive your automobile negligently so that the lives and safety of the public might be endangered. Practically every day of the year I have this question confronting me.

In other words, the Legislature and the people who are behind the Legislature tried to have passed over to the courts the preservation of safety on the highway. That work will never be satisfactorily performed by the courts. I believe thoroughly in giving courts discretion but the discretion should be in the disposition of cases and not in the determination of offences. The truth is that the Legislature has failed in a measure in setting forth offences with regard to the use of automobiles. Some things are perfectly plain. A man driving under the influence of liquor. A man driving without a license. A man driving without proper brakes. All these things have in themselves an element of wrong doing which is recognized. What will you do about this offence of driving negligently so that the lives and safety of the public might be endangered?

If you stop to think you will realize that that makes us all criminals together. I do not hesitate to say that everyone who is now before me and who is a driver of an automobile, as undoubtedly all of you are, has at some time since the first day of January of this year committed this offence. Fortunately you

all have not been caught. Possibly some of you have. You may think that this is too strong a statement. You may say, as men do say to me in court, I have driven so many years or so many thousands of miles and never been spoken to by a police officer. You may be a careful driver but that does not hinder the fact that at some one time you have been a careless driver. For instance, you constantly make turns at street corners. I will suppose that you are all of you of those careful people who make a wide turn at a left-hand corner. Nevertheless there was a morning a week or a month ago when being in somewhat of a hurry and having a pretty clear view down the street you cut the corner. If you did so it was negligent. Now suppose that at that time somebody far more careless than you, I admit, had stepped off the sidewalk from behind a tree or from behind a parked automobile. It is possible that you might have had a death case on your hands. All you did was to cut a left-hand corner a little too close. If nothing had happened your wife might have spoken to you from the back seat and called your attention to the fact and you probably would have laughed and in your heart agreed with her. But whether injury resulted or not you were guilty of driving negligently so that the lives and safety of the public might be endangered and if you had been brought into my court I should have found you guilty and should have imposed the penalty of a fine between $20.00 to $200.00 or imprisonment from two weeks to two years and my friend Parker would have taken your license away for two months. Now I am not talking to a lot of criminals in the court room of the district court in Cambridge,—people who are to be classed with thieves and forgers and other extremely bad persons. I am talking to some very respectable citizens who are deeply interested in the safety of our highways and I am obliged in order to be perfectly truthful to tell those very estimable citizens that we are all criminals together and that applies not only to those who are in the audience but those upon the platform and in order to be perfectly fair I must admit that it includes the speaker himself.

There is something wrong when an entire community is obliged to admit that its individual members are all potential criminals and that the only distinction between the gentlemen who have a criminal record and the rest of us is that they got caught and we did not.

Well, by this time you are asking what is the speaker driving

at? My answer is this. While I do not ask you to excuse the courts from doing their parts in this work I do ask you to realize that ultimate safety upon our highways can never be reached in that way. Think of the problem which the automobile has put upon us. We have a theory that everyone is entitled to use the highways and that everyone shall use them with due regard for the safety of others. That was a very pretty theory for dirt roads and ox-carts. The introduction of the automobile has driven it practically out of business although it still remains the law. Think of what the people of Massachusetts and of every other state are doing. We are building broad smooth highways. We are furnishing anybody above the age of sixteen with high-powered machines weighing a ton or more which can be driven at a speed which is faster than express trains were driven twenty years ago. On to this highway we are putting these powerful machines in the control of almost any one who can pay for a license and along with them we are putting men, women and children, old men and women, babies, horses, dogs, pigs, cows, cats, in fact anything that can move or be moved and we are saying to them all "Now come out on our nice smooth highways and play together and everyone respect the rights of the others" and because the baby carriage and the Rolls Royce have equal rights upon the highway the baby carriage and the Rolls Royce must look out for each other and we are surprised that accidents occur. The one astounding thing in the automobile situation is not that so many accidents occur but that we have so few.

It is no part of my thesis to tell you what I believe is the solution. I have only desired to point out to you the problems which you are imposing upon the courts and to assure you from my experience that the courts are never going to solve it. I believe that the solution will come as it should come from the executive branch of the government. I believe that we will recognize as we are beginning to recognize that certain people must have superior rights upon certain highways. There has been a beginning in this respect already. Certain roads are now definitely established as ways upon which a high rate of speed can be maintained and people coming from intersecting roads are required to stop before entering. I think in the future we will establish more ways given over to automobile traffic and I think in the future we will restrict automobile traffic upon other ways and reserve them for foot passengers. I think in the future we

will eliminate grade crossings for pedestrians at certain busy junctions. We will provide foot passages above or below the surface. We are already controlling busy crossings for automobiles by traffic lights and there are some places where the crossing of pedestrians is controlled by traffic lights. I think that we may decrease speed upon side streets which are not really communicating ways but are entrances for lines of houses in residential districts. If you have a half dozen parallel cross streets between two main highways with houses on either side of the street there is no reason why an automobile should be allowed to go through those streets except at a very slow rate of speed. There are other things undoubtedly which will be accomplished. The wisdom of such councils as we have here will point out what they are to be. They will cost money and the people will have to be taxed to pay for them. But I do not know that they will cost any more than the futile attempts to punish people for things which we call crimes and which we are all guilty of ourselves.

Now lest I should be misunderstood let me in conclusion say this.

I am not at all pessimistic. I believe in the automobile. It has come to stay. I believe that our civilization will adjust itself to our present conditions as it has always been able to adjust itself. I am not at all disturbed because the progress is comparatively slow. You must educate the people before you can change their mode of thinking. It is all being accomplished and I think on the whole the work is being well done. But I do wish to impress upon you that you cannot look to the courts to do it all. We cannot make laws and no matter how much you tell us to we cannot make you all criminals. My plea for the courts is that you do all that you can to diminish the danger attendant upon the use of the automobile and that you make the offences against the law as simple and direct as you can. If you will do that the courts will endeavor to obey your orders and as far as you really desire punish offenders.

PROCEDURE FOR DISCOVERY.

Introductory Statement.

The special Commission on Motor Vehicle Liability Insurance, in its report (Senate 280, reprinted in the Quarterly, February, 1930) recommended the experiment, *in automobile injury cases only*, of machinery for the prompt oral examination of parties before trial (See Report, pages 98–102). The commission believed that such machinery would be more effective in ascertaining the facts and checking "fake" claims or defences than the present system of written interrogatories. This recommendation, like all the other recommendations relating to court procedure submitted by that commission, was not adopted by the legislature; but the following brief account of the procedure in Wisconsin may interest the bar as showing that there is nothing new in the suggestion made by the special Commission on Insurance. A similar recommendation was made by the Massachusetts Judicature Commission in 1920 (See House 1205 of 1921, pages 107–110 and 151–152).

F. W. G.

PROCEDURE FOR DISCOVERY IN WISCONSIN.

By Cameron L. Baldwin.*

(Reprinted by permission from the Journal of the American Judicature Society for April, 1930.)

Wisconsin has had in all its essential features since 1856 a statute relating to discovery which is a substitute for the old "Bill of Discovery" in equity. Since it has worked so long and is so simple in its operation I have been asked to set out its essential features in a short article.

Section 326.12 of the Wisconsin Statutes provides substantially that either party may before trial examine the adverse party, his or its assignor, officer, agent, or employee or the person who was such officer, agent, or employee at the time of the occurrence which is the subject of an action, as an adverse witness before trial after the pleadings have been framed.

A notice served on the attorney of the adverse party at least five days before the examination is all that is required. No motion need be made to the court. A subpoena is issued and witness fees paid to the witness to be examined. The examination is before a commissioner of the circuit court—the court of general jurisdiction

* Of the La Crosse Bar.

—even though the action may be pending in a justice, municipal or county court. Such commissioner has all the powers of a judge at chambers.

The fixed habit of the bar is to dispense with notices. Most examinations are taken when convenient to the counsel for both sides and the time is fixed by oral agreement.

The examination is oral and a real cross-examination is permitted. The examination is written out and signature of the witnesses may be waived. If signature is not waived the party examined reads over his testimony and makes such corrections as he desires to make and the examination is then filed with the clerk of the court where the action is pending. All papers and documents must be produced at the examination and become part of the deposition if desired.

The deposition may be used on the trial against the party examined as an admission against interest and for the purposes of impeachment or of contradicting the testimony of the witness given on the trial.

It will be seen that this necessarily simplifies the issues to be tried because in most instances the material facts as the parties claim them are fully disclosed. Nothing can be more complete in the way of discovery than the proceeding as outlined.

Such an examination often ends the litigation. One may find out that his adversary has certain facts which cannot be disputed and where all the cards are on the table a fair settlement is often effected.

Discovery Before Pleading.

The statute further provides that an examination may be had before issue is joined to enable the party to frame a pleading. The party who desires such an examination must make an affidavit stating the general nature and object of the action or proceeding; that discovery is sought to enable him to plead and the subjects upon which information is desired. In such case the court may make an order limiting the examination so that it may not be made a mere fishing expedition. An example of an examination before issue joined is illustrated in the famous State Treasury Cases: *State* v. *Baetz*, 86 Wisconsin, 29, where the affidavit showed that the plaintiff did not know the banks where the deposits were made by the treasurer; the rates of interest received thereon; the dates of the deposits; the amount received on account thereof by the treasurer, nor the proportion of such deposits which properly belonged to the various funds of the state. Such examination included the securities on the bond of the treasurer.

For an illustration in a negligence case see *Schmitz* v. *Menasha W. W. Co.*, 92 Wisconsin, 529.

The statute is not clear and the practice is not settled as to whether the party examined may give testimony in his own behalf at such examination, but it is usually permitted. It would be a

valuable thing if this uncertainty were made clear by amendment of the statute or by a court rule.

All of the foregoing will be like the A B C's to the Wisconsin practitioner. It certainly is strange that this simple method of discovery has not been generally adopted.

I believe that all the essentials of our procedure are set forth in Bulletin 14—Rules of Civil Procedure, American Judicature Society, 1919. Article 22—*Examination and Discovery.*[1] It appears that such a like procedure exists in Canada and perhaps some of the other states.

The only suggestion is that the procedure set out in Section 22 which requires a motion to secure the examination is useless.

In states where there is no such practice I believe the adoption of our Wisconsin procedure would be a great gain to all who may adopt it.

COLLECTIVE ADVERTISING OF THE BAR BY BAR ASSOCIATIONS — REPORT OF A COMMITTEE OF THE HAMPDEN COUNTY BAR ASSOCIATION.*

To the Members of the Hampden County Bar Association:

The undersigned, who were appointed a special committee by the Executive Committee of the Association, to consider the subject of collective advertising by the Association, have given the subject attention and submit the following as their report:

The practice of law in former years embraced a fairly well defined field, and one who selected the law as a profession could be reasonably assured of an opportunity to gain a livelihood by activity in such field.

The situation which confronted the man or woman who elected to make law his or her profession in former years does not exist at the present time.

The range of a lawyer's work is being rapidly reduced and the very existence of the legal profession is being endangered by the doing of law business by corporations and by individuals who are not lawyers. The attack on the legal profession comes from many quarters. Public accountants are not only doing legal business but are soliciting the doing of such business, and are advertising with reference to it. Real estate agents and agencies are in daily violation of the statutes which relate to the practice of law. Collection agencies are rapidly gaining control of the forwarding business of the country. Trade associations, through their business

[1] Copies of this Bulletin are obtainable at the Society's office on request accompanied by 25c in stamps.

* Approved by the Hampden County Association at its recent meeting in April.

agents, are engaged in the transaction of law business and sometimes actually appear before bankruptcy courts. Insurance companies by themselves and through their agents are advertising with relation to and drawing trust instruments. A lawyer may not advertise, but a group of lawyers can form a trust or corporation to do a title business, who may not only advertise, but actively solicit business.

The worst offenders are banks and trust companies. These institutions are advertising through the press and periodicals and by the distribution of circulars and printed material in every manner and fashion. They not only advertise but they solicit law business and use all the power of their financial resources to induce and to compel the bringing of law business to them.

To meet such a condition an individual attorney is practically helpless. The American Bar Association apparently does not consider the matter of any importance for no relief is in sight from that source. The State Bar Association could do much if it would but its activity along this line has been mainly conspicuous by its absence.

There remains, as about the only organizations left who can take up such matters and do anything, the compact city and county bar associations. For these associations to do any effective work there must be presupposed the fact that they are well organized and efficient. The nature of such organization and the things necessary to the successful operation of such organization are not within the scope of this particular subject.

Assuming, however, that a city or county bar association is efficiently organized it would seem that collective advertising is one of the weapons which can be effectively employed. Lawyers can not individually advertise. The facilities of the legal profession to serve the community can, nevertheless, be presented to the people of a community in a dignified and impressive way through a bar association whether incorporated or unincorporated.

This advertising may be done in many ways. It can be done by the printing and distribution of circulars treating of many and varied topics. It can be occasionally done in advertising, in trade journals, or in the public press. There are many subjects which can be discussed in such advertising, for example, the methods by which forwarding business can be transacted by local and known attorneys in connection with their national associations and to the advantage of local forwarders. The disadvantage of dealing with

centralized agencies who must of necessity turn important matters over to low paid subordinates can also be outlined.

The proper functions of trust companies and banks in connection with trust estates can be brought to the attention of people interested in such matters. The advantages of joint control, either through relatives, friends or attorneys in connection with banks and trust companies can be presented.

The very objectionable practice on the part of banks and trust companies of paying the fees of the attorneys who draw wills and trust agreements for people wishing to constitute such banks or trust companies executors or trustees can be analyzed and set forth. The effect of bank mergers and chain banking in connection with the management of trust estates and trust funds can receive comment. There are many such subjects which can receive treatment and in a dignified and honorable way be presented to the combined clientele of a city or county bar association. To do any such thing effectively might require a central office, a paid secretary with duties somewhat analogous to the business agent of a labor union. The way in which the thing could be done would require much thought and attention.

If such collective advertising were done and done well by a city or county bar association, its effect over a period of time would seem to be calculated to work greatly to the advantage of the legal profession.

Editorial Note.

This interesting report reflects the economic pressure which the bar as a whole is beginning to feel. It also reflects perhaps a certain misunderstanding in Hampden County as to the past activities and possibilities of action by the Massachusetts Bar Association.

The matter of advertising by banks and trust companies was the subject of active consideration at meetings of the Massachusetts Bar Association, of its Executive Committee and of a special committee as well as at hearings before the Committee on Legal Affairs of the Legislature between the years 1924 and 1927. The Committee on the Amendment of the Law of the Bar Association of the City of Boston drafted a bill on the subject which was printed and explained in the *Bar Bulletin* for April, 1924, and reprinted in the Massachusetts Law Quarterly for May, 1924, page 35, with a memorandum in support of it by its draftsman, Mr. William G. Thompson. This was followed at the annual meeting of the Massa-

chusetts Bar Association in December, 1924, by an extended discussion between members of the association and representatives of various banks and trust companies who were invited to take part. This whole discussion was printed in the QUARTERLY for February, 1925, pages 11-33. The matter was referred to the Executive Committee, which was specially requested by the Committee on Legal Affairs to express an opinion. This opinion was expressed (see page 35). A statement of the relation of the Massachusetts Bar Association to the problem was printed on page 39. A detailed report of the special committee was presented to the annual meeting in 1925 and printed in the QUARTERLY for January, 1926, pages 9-17. The committee reported again at the annual meeting of 1926 through its chairman, Mr. Philip Nichols, in regard to the hearing on the proposed bill in the legislature of 1926.

In spite of the extended discussion of the subject by the committees and at the meetings of the association during the past two or three years, the committee reported that little interest was shown in the matter by members of the bar and result was that, on motion of Hon. Herbert Parker, who expressed himself as actively opposed to the bill which had been suggested, the committee was discharged, and the association has taken no action in regard to the matter since.

The whole discussion at the association meetings as well as in conversation with various members of the bar at other times indicated a very marked difference of opinion among members of the association.

At the banquet which marked the close of the eighth annual meeting of the American Law Institute in Washington on May 10, 1930, Justice Royal A. Stone, of the Supreme Court of Minnesota, described the public problem with which the American Bar is faced in the following passages, as reported in the *United States Daily* for May 12, 1930.

> "It has been a long time since any subject of legal thought has assumed in my mind anywhere near the importance which attaches to that of the present plight of our profession.
>
> "Just when its critics began to complain of the atrocities of the law is beyond my scant knowledge of literature. The very dawn of the Christian era found Juvenal, in characteristic fashion, railing against the law for harboring 'a thousand causes of disgust' and 'imposing a thousand delays to be endured.'
>
> "The law's defects through untold centuries have been

no more the subject of jibe and jest than the defects of the lawyers. That suggestion of Jack Code's follower, 'the first thing we do let's kill all the lawyers,' has been worn threadbare by the jokesters at the expense of our profession.

"Of recent years the condition has become worse rather than better. Our profession is not so well considered today as it was, say 10 or 20 years ago. Whether the rising tide of criticism and denunciation is a mere surge in a flow that has been going on for centuries and will soon subside or whether it is a portent of a real and impending danger may not be clear. But it is plain that as a profession we do not enjoy the degree of public confidence to which we aspire to be worthy.

"I am presently concerned in whether we are rendering that kind of service which we must render if we are to maintain our position—whether we are striving to improve our service, both in quality and quantity, as all other professions and vocations are striving, with great success, to improve theirs.

"However much or however justly we may magnify the place of courts in our modern scheme of things, we must not forget that after all they are mere agencies for the dispatch of the people's business. In proportion as they fail in reasonable promptitude of procedure, or by cumbrous methods impose on litigants undue expense or other avoidable burdens, they are open to just censure.

"Without stopping to debate the justice of the tremendous volume of censure to which the American Legal system is now subjected, may we not profitably consider possible improvements, possible means of making our services more valuable and more acceptable to those who pay for them?

. . . . . .

"The people of the United States have a way of finding out when an institution set up and supported by them for their own service ceases to function properly. They are patient and slow to anger. But, when aroused, they frequently take the matter of reform into their own hand. And then sometimes they overdo the reforming and produce evils as great, if not greater, than those they seek to remedy.

"So the American lawyer should be prompt and eager to meet frankly and with open mind the critics of his profession. That is not only our paramount duty but also our own primary interest.

. . . . . .

"No other group is facing such a peril or going through such a drastic economic evolution, whichever you wish to call it, as that to which the American lawyers are now subjected by the competition of corporations. Whether good or bad for clients, it is a major crisis for lawyers. The thing

> will not go as we want it to go, or stop where we want it to stop.
>
> "It will go where the people want it to go and will not stop until they want it to. So far as it is a desirable evolution it can no more be halted while there is the pressure of need behind it than a glacier can be stopped while its propelling pressure remains."

While, as Judge Stone says, economic demands of the community can not be indefinitely resisted by the bar, some public misunderstanding of the profession may be avoided as suggested in the following extract from a letter received by the Editor from Vernon W. Marr, one of the counsel of the Boston Legal Aid Society, whose experience with the views of large numbers of poor people in regard to the legal profession add peculiar weight to what he says. Probably no lawyers in the commonwealth, outside the Grievance Committee of the Boston Bar Association, see so much of the seamy side of the profession and the distressing results of the unprofessional activities of a variety of lawyers on unfortunate poor people as the counsel for the Boston Legal Aid Society.

Mr. Marr's letter to the President of the Hampden County Bar Association, copy of which he forwarded to the Editor, was inspired by the publication of the substance of the Hampden County report above quoted. Mr. Marr says:

> "Personally, I believe that every Bar Association needs such a committee. At the present time the relations of the Bar and public are decidedly strained. Lawyers are generally considered by the public as dishonest or requiring close watching. There is no group activity to dispel this erroneous idea, whereas every sound business enterprise gives the most careful attention to preserving and fostering the good will of the public. I believe that you should call upon other Bar Associations for co-operative effort, but congratulate you for proceeding without relying upon outside aid."

So far as we have observed, the character of advertisements of banks and trust companies in the metropolitan district, at least, has become less objectionable since the discussion in the association and with the representatives of the Corporate Fiduciaries Association, in that the slurs on the bar which formerly were common in pictures and otherwise have ceased. Under a government of laws, such as ours, the health of the community requires a well-trained and reliable bar which is not only entitled to respect, but is respected. For such organizations as banks, trust companies or other corporations to attempt to undermine that respect for business purposes

is a very short-sighted policy which is not likely to be profitable in the long run, and those in charge of corporation advertising, etc., will do well to reflect on this aspect of the problem if they have not done so already. F. W. G.

JUDICIAL FUSSINESS IN PROBATE PRACTICE.

Editor, Massachusetts Law Quarterly: MARCH 6, 1930.

I am writing this letter entirely in the spirit of suggestion.

I have practiced law for about twenty-five years and have had a great deal of experience in Probate practice. It has always been my practice to carry on the administration of estates in such a manner as will be most economical to the estate, and it seems to me that Probate Courts should assist, as far as possible, attorneys in their endeavors to advise wisely and economically, even though in so doing all the requirements of the law may not be technically complied with.

There are several matters which have recently come to my attention to which I should like to refer.

Recently I was appointed Trustee under the will of , who died many years ago, and who provided by his will that one-third of the property should be held in trust for his minor child to be paid over to her when she became of age. No Trustee was ever appointed, but the question was recently raised by a conveyancer that this daughter did not receive a good title, but should receive title through a Trustee. To remove this technical defect, I was duly appointed Trustee and the necessary deed was executed. I then prepared a Final Account, and all the proceedings were assented to by the only possible party in interest, the daughter of the deceased. With the account I filed an inventory and described the real estate as one undivided third interest of all the real estate of which the said died seized. This inventory came back to me with the request that I describe the real estate in detail. Now I was trying to put this matter through in the least expensive way possible for my client, and I can not quite see why anybody's right was jeopardized if I decided to make a general description of the real estate, rather than to dig out a detailed description. There are no minors nor contingent interests interested, and the only person who had any interest whatever in this Trust assented to all proceedings. I had to send a Clerk from my office over to dig out the real estate

records and file a more detailed statement to satisfy the Probate Office. The next day the Account came back to me with a letter stating that no inventory had been filed, although it was in the Probate Office at the time. In other words, I do not quite see why the time of the Probate Court should be taken in this particular case, or in a case like it, to require changes and alterations which do not jeopardize anybody's rights, but which may not be in technical compliance with the statutes or decisions. If all the parties interested are of age and assent, why should not the proceedings go through without question?

A few years ago one , late of , died intestate, leaving real and personal property, and the income from the real estate was not sufficient to pay the carrying charges. The heirs were six children. While I well appreciated that technically the administrator took charge of the personal property and the heirs took charge of the real estate, obviously it was for the interests of all the heirs to have the estate, both real and personal, managed together, and I so advised the administrator, and this estate was carried on in this manner with the approval of all the heirs. It would have been much more trouble and expense to the estate to have differentiated between the real estate items and the personal property items. I prepared an account for the administrator showing the whole situation, both real and personal, which obviously was simpler and less expensive than to attempt to make two accounts,—one as administrator and the other as agent. The whole proceeding was with the approval of all the heirs and all the heirs were of age. I filed the account, took out citation, filed my return and was notified by the Probate Office that the account would not be allowed because it contained some items relating to real estate. This was obviously a case where I was endeavoring to advise as to the administration of the estate in a manner which would be most economical, and to file a new account or to substitute another account would obviously mean trouble, bother and expense to the estate. I have been advised by some excellent attorneys that even under such circumstances the law permits an account to be filed showing real estate transactions, but I have not taken the time to examine the law. But, assuming that technically the Probate Office is correct in its view that an account should not contain real estate items, I can not see whose rights are jeopardized if this account should be signed. I have acted in similar cases in many instances, and have often filed similar accounts, and they have

always up to this time been allowed, and I have never had any suggestion that anybody's rights would be affected in any way by the allowance of such an account. If it may be that the account contained some items which should not be there under technical interpretation of the law, I can not see why, if no objection is raised by the heirs who have been notified and who are of age, there would be any harm in having the account allowed.

I understand that it has been the practice of the Probate Court in County not to approve an inventory when the oath of the appraiser was dated after the oath of the fiduciary.* I have not had any recent experience in this matter, but some time ago an inventory was sent back to me for this reason. Personally, I am of the opinion that the oath of the fiduciary should pre-date the oath of the appraiser, and this view is held by others. But even if this view is incorrect, what difference does it make whether or not the oath is taken before or after? Whose rights in the trust are jeopardized by any such question? I do not see why the time of the Probate Court should be taken up in the consideration of questions which, even if perhaps technically correct, do not in any way affect the interests of any party connected with the proceedings.

I have the highest regard for the due observance of law and procedure, and in any question where the substantive rights of any party interested might be affected I am strongly in favor of following carefully the statutes and the decisions. On the other hand it is well known that in many respects the law is technical, and it seems to me that where it appears that an attorney, who is an officer of the Court, is endeavoring to administer estates in a manner which will be least expensive to the estates, the Probate Court should, as far as possible, assist in so doing, and the more technical requirements might be waived from time to time which do not in any way affect substantive rights.

It may be that my viewpoint on all these matters is entirely erroneous and that there may be substantial reasons for the requirements of the Probate Court in these various cases, but I wish to reiterate that I am writing this letter not with any idea of adverse criticism, but simply with the idea of presenting my own viewpoint on matters which have come to my attention.

Respectfully yours,

ALBERT M. CHANDLER.

*This practice was discussed in the MASS. LAW QUARTERLY for August, 1928, at p. 98.

THE PROPOSED REVISION OF THE RULES OF THE SUPERIOR COURT.

The Justices of the Superior Court are considering a general revision of the rules of that court and requests for suggestions to representatives of various bar associations were recently sent out by the Chairman of the Committee on Rules. If any members of the bar have any suggestions to submit, the Editor will be glad to receive them and to pass them on to the Committee on Rules for their consideration. F. W. G.

Some Early Massachusetts Common Law as to an Excessive Ad damnum and Graduated Entry Fees.

The Body of Liberties of 1641, which reflected the common law of Massachusetts, provided as follows in Liberty 22,

> "No man in any suit or action against another shall falsely pretend great debts or damages to vex his adversary; if it shall appeare any doth so, the Court shall have power to set a reasonable fine on his head."

The "Laws and Liberties" of 1648 provided as follows:

> "2. It is ordered by this Court & Authoritie thereof, That every perfon impleading another in any court of affiftants, or County court fhal pay the fum of ten fhillings before his cafe be entred, vnles the court fee caufe to admit any to fue in *formapauperis*. (1642).
>
> "3. It is ordered by the Authority aforefayd, That where the debt or damage recovered fhall amount to ten pounds in every fuch cafe to pay five fhillings more, and where it fhall amount to twenty pounds or upward there to pay ten fhillings more then the firft ten fhillings, which fayd additions fhall be put to the Judgment and Execution to be levied by the Marfhall and accounted for to the Treafurer. (1647)."

It is a noticeable fact that, with such entry fees as early as 1642 and 1647, Massachusetts in 1930 should require entry fees in the Superior Court of only three dollars, considering the relative value of money as between the seventeenth century and the present time. It is estimated that money in the seventeenth century was worth about ten times what it is worth now so that ten shillings then was equivalent to about $25. to-day.

As to the early practice about excessive claims, possibly the Superior Court, in connection with the revision of its rules, may be able to invent some practice other than the common one of inserting in the writ, an *ad damnum* out of all proportion to the amount of the claim. F. W. G.

CAUTION TO CONVEYANCERS AS TO ENDORSERS AND TOWN BY-LAWS.

Editor, Massachusetts Law Quarterly:

Two cases have come to my attention, one of which indicates that there is a new danger to conveyancers which heretofore has not been considered.

One case is the *First National Bank in Medford* v. *Wolfson*, which appears in the advance sheets, page 989. The circumstances of the case were substantially as follows:

A promissory note was made by the R. & W. Realty Company payable to the bank. On the back of the note was *printed* the familiar language "waiving demand, protest and notice of non-payment." The R. & W. Realty Company was a corporation. Directly under the words "waiving demand, protest," etc., appeared the name of Isaac Rosenblatt and under his name appeared the name, Samuel J. Wolfson. The two individuals owned approximately all of the stock in the realty company. There was no demand, protest or notice or non-payment as far as Wolfson was concerned.

The question before the court appears to be whether the second endorser is bound by the clause "waiving demand, protest," etc. The trial judge ruled that the words were binding upon the defendant. The court, in construing the Negotiable Instruments Act, held otherwise.

It is, therefore, clear that if it is intended that several endorsers are to be held as waiving demand, notice, etc., that this liability must appear by sufficiently specific language as applying to each or all. This is not in harmony with the usual custom of banks and for that reason it is necessary to exercise considerable care in order to hold the endorser without notice.

The other case has been called to my attention as follows:

Genesis of Slack *v.* Inspector of Buildings of the Town of Wellesley.

A sells his land to B in the Town of Wellesley. B employs competent counsel who examines the record title (in fact the title was a registered one) including the usual examination of the Town records for municipal liens and assessments. By accident, prior to the passing of title it was learned that a permit would not be granted by the Town authorities to construct a building on the whole of the land because sometime prior thereto the Town had passed a by-law declaring that all first and second class buildings could not be placed nearer than forty feet to the centre

line of the street on which this property abutted. This amounted to a twenty-five foot set back as the street on which the property abutted was only thirty feet wide. This by-law reduced the value of the property about forty per cent. and resulted in an action, which is reported as *Slack* v. *Inspector of Buildings of Wellesley*, 262 Mass. 404, to determine the validity of the by-law.

Abstract of the case.

SLACK *v.* INSPECTOR OF BUILDINGS OF WELLESLEY, 262 Mass. 404.

Petition for writ of mandamus seeking to compel building inspector of town to issue permit for erection of buildings.

Petitioners own the land; have complied with law in filing plans and specifications; but their plans provide for a building that will extend to the sidewalks of abutting street. The Town has a building by-law as follows:

"All 1st and 2nd class buildings shall be placed at least forty feet away from centre line of any adjacent street, all 3rd class buildings shall be placed at least fifty feet from centre line of adjacent street."

The petitioners contend that this by-law is not valid because it establishes a building line which is not possible under G. L. Chap. 143, sec. 3 (police power statute) but must be done under G. L. Chap. 82, sec. 37 (eminent domain statute).

HELD: Petition dismissed.

G. L. Chapter 143, sec. 3 (police power) is as follows: "Every town may for the prevention of fire and preservation of life, health and morals by . . . by-laws consistent with law and applicable throughout the whole or any defined part of its territory, regulate the inspection, materials, construction, alteration, repair, *height, area, location* and use of buildings and other structures within its limits." The italic words were added in 1912—the general features being first enacted in 1872.

The by-law does not go beyond the authority conferred by words of the statute. It is a statute enacted in the exercise of the police power. Apparently the by-law was adopted to aid in prevention of fires and not as a set-back line.

A by-law can be enacted under G. L. Chapter 143, sec. 3 (police power) by its express terms only "for the prevention of fire and the preservation of life, health and morals". It must be presumed that the by-law here assailed was enacted with a genuine purpose to accomplish these permissible ends, no one of which is the establishment of a building set-back line—if any other design it must be under G. L. Chap. 82, sec. 37.

The by-law is constitutional as thus interpreted even though no provision is made for the payment of damages to owners of property injured thereby.

N. B. at p. 407, "A building line under G. L. Chap. 82, sec. 37 (eminent domain) must be measured from the side line of the street and not from its centre."

It would seem, therefore, that in examining titles to property outside of Boston it is necessary to examine the By-laws in the case of towns and the Building Laws in the case of cities—otherwise there is no assurance that what in effect is a building line, has not been established on the property.

WILMOT R. EVANS.

HOUSE . . . . No. 1274

The Commonwealth of Massachusetts

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT, RELATIVE TO A PLAN FOR MEASURED SERVICE AND COMPENSATION FOR JUDGES OF ADVANCING AGE.

April 15, 1930.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

The Justices of the Supreme Judicial Court respectfully submit this answer to the question in an order adopted by the House of Representatives on March 25, 1930, and transmitted to them on March 27, 1930, copy whereof is hereto annexed. The question relates to the constitutionality of a proposed bill embodied in the report of the Judicial Council for 1929 and transmitted to the General Court by his Excellency the Governor. Thus it appears that the proposed bill is pending for legislative action. *Opinion of the Justices*, 217 Mass. 607. The proposed bill is short and the constitutional questions involved are obvious without further specifications than are set forth in the order. *Opinion of the Justices*, 239 Mass. 606, 612.

That bill is entitled "An Act to Provide for Part-time Service and Measured Compensation for Judges of Advancing Age." It applies only to judges of the Superior and Land courts and of the Municipal Court of the City of Boston. No other courts or judges are affected by it. The essence of the bill is in § 4. It is provided in that section that any judge of any of these three courts who has served fifteen years or more "may with the approval of the Governor and Council" and any such judge who

has reached "the age of seventy years shall, retire to part-time service subject to the call of the" chief or presiding judge of such court. Thereafter the judge so retired shall not be required to serve for more than one-half time, shall to the extent of such half-time service be subject to the call of the chief or presiding judge of such court and shall receive one half of the full salary. Such chief or presiding judge may also call upon such retired judge "for more than such half-time service if he is able and willing to serve," and, if so serving, he shall receive a proportionate amount of the salary for full-time service.

The final provision of the section relates to the chief or presiding judges of those three courts and is in these words: "A chief justice of the Superior Court or of the Municipal Court of the City of Boston who has served for fifteen years or more as a justice or chief justice of such court may at any time, and upon reaching the age of seventy shall, retire to the part-time service of a justice of such court described herein. Upon such retirement a vacancy shall exist in the position of chief justice. A new chief justice shall be appointed and thereafter the duties of such retired chief justice shall be those of a retired justice subject to the call of the chief justice as provided herein and the compensation therefor shall be measured accordingly. The foregoing provision as to chief justices shall apply also to the position of judge of the Land Court."

We interpret the provision respecting retirement of a judge who has served fifteen years with approval of the governor and council to mean an optional retirement originating in a request to that end from the judge, and not to denote a possible forced or involuntary retirement. The words "may . . . retire" in their context have this signification. *Brown* v. *Little, Brown & Co. (Inc.)* Mass. Adv. Sh. (1929) 2077, 2085, 2086, 2087. We are of opinion that a provision of this nature, if enacted into law, would not contravene any provision of the Constitution. It would be in substance an offer held out by the Commonwealth and accepted by a judge with respect to diminished work to be performed by him presumably

because of waning capacity and the diminished compensation to be received therefor. The public welfare would be guarded adequately by the requirement that the arrangement must have the approval of the governor and council. This provision would come within the general power of the legislative department of government over courts created by it.

It is plain that the provision as to the retirement to part-time service of a judge on reaching the age of seventy is designed to be compulsory and not optional with the judge. No matter how great might be his physical and mental strength and vigor and energy, such judge would be compelled to retire to part-time service and to receive part-time pay. He would have no alternative. This is apparent, not only from the use of the word "shall," which in its ordinary significance imports a mandate, but from its use in contrast to the permissive word "may" employed earlier in the same sentence with respect to judges who have served fifteen years. The words with respect to judges who have reached the age of seventy years are words of command and not of choice. They express a positive and inflexible legislative determination. *Decatur* v. *Auditor of Peabody*, 251 Mass. 82, 88. The judge of seventy years may be called for service of more than half time with his own consent, but whether he shall be so called depends upon the volition of the chief or presiding judge of the court. Thus the amount of service beyond half time to be rendered by him would rest in its last analysis solely upon the decision of another. Whether a statute of this tenor is within the scope of legislative power requires examination of certain provisions of the Constitution.

No one of the three courts mentioned in the proposed bill is established by the Constitution. All of them were instituted under the power and authority conferred on the General Court by c. 1, § 1, art. 3 of the Constitution "to erect and constitute judicatories and courts of record, or other courts." As a part of this comprehensive grant of power the General Court may, according to its conceptions of the requirements of the general welfare, regu-

late and limit and change and transfer from one to another the civil and criminal jurisdiction of those courts. It may abolish existing courts, except the Supreme Judicial Court, and erect others in their place and in its wisdom distribute among them jurisdiction of all justiciable matters subordinate to the one court established by the Constitution. It may settle and increase or diminish the salaries of the judges of courts so erected. The amplitude of this legislative control over such courts, however, is bounded by other provisions of the Constitution. *Commonwealth* v. *Leach*, 246 Mass. 464, 470–471. *Walton Lunch Co.* v. *Kearney*, 236 Mass. 310, 317. *Opinion of the Justices*, 3 Cush. 584. *Commonwealth* v. *Hawkes*, 123 Mass. 525, 528–529. This grant of power to the General Court to erect and constitute courts, broad as it is, does not include the tenure of the judges of such courts. That is fixed by the Constitution itself. It is provided by c. 3, art. 1 of the Constitution that "All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: provided, nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature"; "and [according to Amendment 58 ratified and adopted November 5, 1918] provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement." The exception mentioned relates to justices of the peace and has no bearing upon the present question. The tenure of office of judges as thus settled by the Constitution is imperative and final. It cannot be enlarged, limited, modified, altered or in any way affected by the General Court.

In conformity to this provision of the Constitution the commissions of judges of the courts named in the proposed bill state in substance that the appointee is to hold said

trust during his good behavior therein unless sooner removed therefrom in the manner provided in the Constitution.

The provision as to the tenure of all judges of the United States, both of the Supreme and of the inferior courts, in art. 3, § 1 of the Constitution of the United States, is in the same words as those in c. 3, art. 1 of the Constitution of this Commonwealth, viz., that they "shall hold their Offices during good Behavior." Respecting such inferior courts of the United States, it was said in *Ex parte Bakelite Corp.* 279 U. S. 438 at 449: "They . . . have judges who hold office during good behavior, with no power in Congress to provide otherwise."

The inevitable effect of the part of § 4 of the proposed bill touching compulsory retirement of certain judges is to make something else than good behavior an element in judicial service. It is no imputation on good behavior to become seventy years old. It is no evidence whatever of evil behavior or of want of good behavior to pass the age of three score and ten. Age and good behavior are unrelated subjects. There is no connection between the two. And yet, under the proposed bill the compulsion of half-time service and half-time pay for judges of the designated courts arises when the age of seventy comes, regardless of every other circumstance or consideration.

Tenure of office during good behavior imports not only the length of the term but also the extent of service. The Constitution in this particular means that judges "shall hold their offices during good behavior," not that they shall hold half of their offices after a certain age and such other fractional part as some other person may determine. The Constitution itself, in the words already quoted, makes two provisions to relieve the judicial service of judges no longer competent to render efficient service. It contains a specific clause in art. 58 of the Amendments affording the means of retiring a judge "because of advanced age or mental or physical disability." The proposed bill adds another and diverse method to the same end. It would deprive such judge

against his will of the right to render full-time service for full-time pay. That is beyond the power of the legislative department of government. When the Constitution has made definite provision covering a particular subject, that provision is exclusive and final. It must be accepted unequivocally. It can neither be abridged nor be increased by any or all of the departments of government.

There is a further difficulty with both the compulsory and the optional provisions of the proposed bill touching the chief justices of the Superior Court and the Municipal Court of the City of Boston and the judge of the Land Court. Each of those judges by the terms of his commission holds an office in effect making him the presiding judge of the court. Each of those offices is different from that of an associate judge of the same court. This difference is made manifest by the name of the office, by the terms of his commission, by the salary attaching to the office, and by the nature of some responsibilities reposed in the incumbent of the office. *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 72. He cannot under the terms of his commission retire voluntarily or be retired by compulsion to the part-time service of an associate judge. That result can be accomplished only by resignation and reappointment as an associate. By the proposed bill he must vacate that office of primacy in his court either on his voluntary retirement or on reaching the age of seventy and in either event a successor must be appointed in his stead. Under the Constitution he cannot be demoted to another office. For reasons already stated, that would be in violation of c. 3, art. 1 of the Constitution as amended by art. 58 of the Amendments. The provisions of art. 58 of the Amendments afford the only way of retiring without their consent these judges because of advanced age. That way excludes all others. It alone can be adopted.

It is our opinion that the provisions of the bill concerning permissive retirement of the judges of the several courts are not in conflict with the Constitution, but that all its provisions for compulsory retirement and for

compulsory or voluntary retirement of the chief or presiding judges are in conflict with c. 3, art. 1, as amended by art. 58 of the Amendments of the Constitution.

ARTHUR P. RUGG.
JOHN C. CROSBY.
EDWARD P. PIERCE.
JAMES B. CARROLL.
WILLIAM C. WAIT.
GEORGE A. SANDERSON.
FRED T. FIELD.

April 15, 1930.

EDITORIAL NOTE.

Since the suggestion for an automatic adjustment of judicial service and compensation to advancing years is unconstitutional, the question arises as to the best constitutional method of dealing with practical conditions which have recently existed and which may arise again, or may, perhaps, even still exist.

It is clearly constitutional under the foregoing opinion to provide a permissive arrangement under which associate justices of advancing years after fifteen years of service may voluntarily adjust their service and compensation to a part-time basis, with the approval of the Governor and Council. This part of the recommendation of the Judicial Council seems an advisable plan. We believe that there are some justices on one or more of the courts involved in the plan who would be glad to take advantage of the opportunity for reduced, but continued, service, and from whose part-time service the Commonwealth would continue to receive the value of experience which is worth retaining.

Whether or not this voluntary plan is adopted, the question will remain as to those judges who stay on the bench after they have ceased to be capable of continued effective service. Such judges obviously rely on the reluctance of the Governor and Council to undertake the unpleasant task of retiring them under the fifty-eighth amendment. They retain their positions and draw their full salaries without rendering adequate service. Of course we do not refer to judges who are merely temporarily incapacitated for service. Temporary illness is part of the lot of every one. The cases to which we refer in this discussion are those in which the judge has become so permanently weakened that he is not functioning effectively, and is simply being carried at public expense and at the expense of other members of his court, who are obliged to assume and do the work which he is unable to do. Occasional instances of this sort of thing are familiar, not only to older members but to many of the younger members of the bench and bar. In such cases, what is to be done for the good of the service? The answer seems to be clear.

It is true, as stated in the foregoing opinion, that —

> It is no imputation on good behavior to become seventy years old. It is no evidence whatever of evil behavior or of want of good behavior to pass the age of three score and ten.

While that is true, it is not so clear that —

> Age and good behavior are unrelated subjects. There is no connection between the two.

The reason this is not so clear is that the question remains unanswered whether it is "good behavior" for a judge to remain on the bench and draw his full salary after he has become incapable of continuing to render the judicial service for which he was appointed and for which he is paid.

However difficult and pathetic the circumstances may be, it seems clear beyond the possibility of contradiction that it was not the intention of the constitution that such a judge should remain in office. This is demonstrated by the early case of Judge Bradbury in 1803, an able judge, the value of whose service was unquestioned. He became incurably ill, and for more than a year was unable to serve. The work of the Supreme Judicial Court, of which he was a member, was naturally interfered with. He had nothing to live on except his salary and for that reason he did not resign. Thereupon, a proceeding for his removal under the constitution was begun in the Legislature, and he was removed by the Governor and Council upon address by both houses, after hearing in which Daniel Webster and others appeared in opposition to the removal. Judge Bradbury died within a few months after his removal, so that the problem of his support did not continue.

The fifty-eighth amendment was submitted by the constitutional convention of 1917 and adopted by the people for the purpose of providing a simpler and less cumbersome method of retiring a judge because of "advanced age or mental or physical disability" for the good of the service. The reasons specified are in the alternative, and "advanced age" alone is a sufficient cause for retirement. It is not necessary that "disability" in the sense of any particular mental or physical defect should be shown or should exist. There are some judges, of whom Judge Holmes is the most striking example, who retain their mental and physical strength and capacity for work far beyond the average, but we all know that this is not true of most men.

We believe that the time will come eventually in the life of every judge, if he lives long enough and remains on the bench, when the good of the service will require his retirement under the fifty-eighth amendment. Without intending to suggest any unreasonable standards, we believe that the judges themselves should realize this, should anticipate it so far as practicable by savings, and should endeavor to avoid the creation of a situation such as has recently existed in some of the courts. They should not consider it either a disgrace or a criticism of their judicial service to be retired under the fifty-eighth amendment. They should remember that no judge was ever appointed "for life" in Massachusetts. The constitution provides for nothing of the kind.

F. W. GRINNELL.

TWO RECENT OPINIONS AS TO PRACTICE ON THE INITIATIVE PETITIONS FOR A "MOTOR VEHICLE INSURANCE FUND" AND AS TO THE PROVISIONS OF THE BILL (HOUSE 202) THEREIN REFERRED TO.

The forty-eighth amendment providing machinery for the initiative and referendum subject to certain specified and important limitations, was adopted in 1918. It was a new experiment in Massachusetts and the nature of a new and somewhat complicated piece of constitutional machinery, with its relation to other parts of the constitution, needs time to sink into the minds of lawyers whose constitutional training did not include the study of such an instrument of government as the initiative.

The recent opinion of the court in the case of *Horton* v. *Secretary of the Commonwealth* and the advisory opinion of the Justices, hereinafter printed, are two of the most important opinions upon the subject.

The Practice as to "Certificates" Under the Opinion in the Horton Case.

In the Horton case (1930 Advance Sheets, pages 149–160), the question of the finality of the certificate of the attorney general that the proposed law was within the scope of matters subject to the initiative was dealt with as follows:

> "A preliminary question as to the power of the court to consider the issues raised by the petitions has been argued and must be decided. There are not to be found in article 48 of the Amendments to the Constitution any words indicative of a purpose that, respecting proceedings pursuant to its provisions, the courts are shorn of their ordinary powers. It is elementary in constitutional law under the Constitution of this Commonwealth that a duty is cast upon the judicial department of government, when the question is properly raised between litigants, to determine whether a public officer is overstepping constitutional bounds or statutes duly enacted conform to the fundamental law as expressed in the Constitution. It is a delicate duty, always approached with caution and undertaken with reluctance, but an imperative duty which cannot be escaped. The words defining the authority and obligation resting on the Attorney General

> under 'The Initiative,' Part II, § 3 of art. 48 of the Amendments to the Constitution, import no more of unreviewable finality than do those of c. 1, § 1, arts. 3 and 4 of the Constitution and of art. 2 of its Amendments creating the legislative powers of the General Court, or those of art. 21 of the Amendments conferring upon commissioners power to divide the territory of the several counties into representative districts. Genuine controversy as to the conformity of acts of these bodies to the requirements of the Constitution is a justiciable subject and cognizable by the courts when properly presented. See, for example, *Portland Bank* v. *Apthorp*, 12 Mass. 252, 253; *Wellington, petitioners*, 16 Pick. 87, 95; *Larcom* v. *Olin*, 160 Mass. 102; *Perkins* v. *Westwood*, 226 Mass. 268, 271; *Vigeant* v. *Postal Telegraph Cable Co.*, 260 Mass. 335; *Attorney General* v. *Methuen*, 236 Mass. 564; *Attorney General* v. *Apportionment Commissioners*, 224 Mass. 598; *Duffy* v. *Treasurer & Receiver General*, 234 Mass. 42; *Juggins* v. *Executive Council*, 257 Mass. 386. It follows irresistibly from these indisputable premises that the certificate of the Attorney General under said § 3, Part II, 'The Initiative,' is open to inquiry as to its conformity to the Constitution in appropriate proceedings. That was decided in substance in *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91. It was stated in *Opinion of the Justices*, 262 Mass. 603, 606. Nothing contrary to these principles was decided in *Anderson* v. *Secretary of the Commonwealth*, 255 Mass. 366, or in *Thompson* v. *Secretary of the Commonwealth*, 265 Mass. 16. Without analyzing those decisions, it is enough to say that, if anything there said is thought to be of broader sweep, it must be narrowed to the particular facts of each case and be taken to be limited by the underlying principles upon which the present decision rests."

The court then sustained the attorney general's certificate so far as the provisions of the forty-eighth amendment were concerned, but expressly declined to consider questions of general constitutionality other than those involving conformity to the forty-eighth amendment. On that point, the court said:

> "The petitioners further contend that the proposed law, assuming that it conforms to the general scope of said art. 48, is in its terms and effect violative of other provisions of the Constitution. Questions of the general constitutionality of the proposed law are not open to the petitioners in these proceedings. It does not appear that either of the respondents has undertaken to pass upon such questions. Plainly, no words in said art. 48 expressly authorize at this stage. respecting a law proposed under the popular initiative, judi-

cial inquiry into its conformity to other provisions of the Constitution. It is a general principle that no one can question in the courts the constitutionality of a statute already enacted except one whose rights are impaired thereby. The judicial department of government has no power to inquire into the constitutionality of statutes by proceedings directly to that end. It is only when some person invokes their aid to protect him in his liberty, rights or property as secured under the Constitution against invasion through the operation of a statute, that the courts examine objections to its constitutionality. Only those directly affected as to some personal interest by the operation of a statute can question its validity. Ordinarily strangers have no standing in the courts on such matters and to that end. This principle was early declared by this court and has been consistently followed. *McGlue* v. *County Commissioners*, 225 Mass. 59, 60, and cases there collected. See also *Gorieb* v. *Fox*, 274 U. S. 603, 606. Nothing inconsistent with that principle was decided in *Siegemund* v. *Building Commissioner of Boston*, 259 Mass. 329, 335, or in *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91, 92, 93, and cases there reviewed, where proceedings were entertained at the instance of those having no private interest for the enforcement of public duties. Reasons supporting that principle apply with at least equal force to judicial inquiry as to the constitutionality of a law proposed under the popular initiative, which may never become a statute and may never affect the private rights of any person.

"The popular initiative relates to legislation. It is an extension of the instrumentalities for legislation. 'The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.' 'The Initiative,' Part II, § 2. There is no provision in the Constitution that a petition accompanied by a proposed bill shall not be presented to and received and considered by the General Court unless constitutional in every aspect. There is nothing in art. 48 of the Amendments altering or limiting with respect to it this general constitutional practice. The judicial department of government cannot interfere with the ordinary processes of legislation. *Boston* v. *Chelsea*, 212 Mass. 127. *Dinan* v. *Swig*, 223 Mass. 516, 519. *Cosmopolitan Trust Co.* v. *Mitchell*, 242 Mass. 95, 116. See *State* v. *Superior Court*, 92 Wash. 44; *State* v. *Charleston*, 92 W. Va. 61; *State* v. *Osborn*, 16 Ariz. 247; *People* v. *Mills*, 30 Col. 262; *Pfeifer* v. *Graves*, 88 Ohio St. 473, 487; *Pitman* v. *Drabelle*, 267 Mo. 78, 89.

"Judicial inquiry of this nature differs essentially from that already entered into in this opinion touching the con-

formity of the proposed bill to the requirements of said art. 48 in order to determine whether it has any standing under that article for transmission to the General Court by public officers.

"Jurisdiction is vested in the legislative department of government to consider the constitutionality as well as all other features of measures 'introduced into the general court by initiative petition.' See art. 48 of the Amendments, 'The Initiative,' Part III, *Legislative Action*. When under this Part of said art. 48 the proposed law shall be considered, there will be opportunity for the General Court or either branch thereof, if it so desires, to obtain advice as to its constitutional aspects from the Attorney General. G. L. c. 12, § 9. See also c. 3, art. 2, of the Constitution.

"The questions argued and no others have been considered. The conclusion is that there is no such failure to conform to the requirements of said art. 48 as to prevent the transmission of the proposed law to the General Court for consideration."

THE FACTS LEADING TO THE REQUEST FOR THE ADVISORY OPINION AND THE LEGISLATIVE RESULTS OF THAT OPINION.

After the decision in the Horton case House Bill 202 was "transmitted" by the Secretary of the Commonwealth to the Clerk of the House of Representatives with petition blanks signed by the number of voters required for an initiative petition under the forty-eighth amendment. The bill was reprinted for the information of the bar in the supplement to the MASSACHUSETTS LAW QUARTERLY for February, 1930, for consideration in connection with the Report of the Special Commission on Motor Vehicle Liability Insurance (Senate 280), which was also reprinted in the February number of the QUARTERLY and in which the proposed bill (House 202) was discussed at length.

The description which appeared at the head of the petition blanks on which signatures were collected was quoted in full in the Report of the Commission on pages 130–131 and doubts as to the constitutional sufficiency of that description under the forty-eighth amendment were expressed and explained in that report on pages 128–136. Various questions as to the constitutionality of the provisions of the bill were also raised in the report and it was suggested that, before following the specified legislative procedure required by the forty-eighth amendment upon initiative petitions, the advisory opinion of the Justices of the Supreme Judicial Court should be obtained, *first*, as to the constitutional sufficiency of the "descrip-

tion" on the blanks in order to ascertain whether the documents "transmitted" by the Secretary of the Commonwealth constituted an initiative petition requiring the procedure specified by the forty-eighth amendment and *second*, whether the proposed law, if adopted by the legislature or by a majority of the voters, would be valid.

As recommended by the Committee on Insurance and the Committee on Rules, the Senate submitted to the justices a number of questions not presented and passed upon in the Horton case and the justices answered those questions as appears in their advisory opinion submitted on April and printed as Senate 395. In view of the far-reaching importance of this opinion both in its bearing on the administrative questions under the forty-eighth amendment and on the other constitutional questions raised by the proposed "state fund" bill, reprints were obtained from the State Printer and are bound up with introduction in order that the bar may have a convenient opportunity to become familiar both with the development of practice under the Initiative and Referendum Amendment and with the reasoning of the justices relative to the proposed "State Fund" Bill.

After receiving the opinion of the justices, the Senate, on April 22, and the House, on April 24, accepted the Report of the Committee on Insurance set forth in the following extract from the Journal of the Senate of April 21:

> "By Mr. Hale, for the committee on Insurance, asking to be discharged from the further consideration of the document which purports to be an initiative petition of Frank A. Goodwin and others for the establishment of a State motor vehicle insurance fund to provide compensation for injuries and deaths due to motor vehicle accidents (House, No. 202), —on the ground that the said petition does not constitute a legal initiative petition within the terms of article XLVIII of the amendments to the Constitution of the Commonwealth, in view of the opinions of the Honorable the Justices of the Supreme Judicial Court, printed as Senate Document No. 395, that said petition does not comply with the mandatory requirements of said article XLVIII;"

This action closed the discussion of the "State Fund" Bill for the present session of the legislature.

In the light of this opinion of the justices, it is obviously a very serious responsibility which is placed upon the attorney general by that part of the forty-eighth amendment which provides that he shall "determine" the "description" of a proposed constitutional

amendment or law which shall appear both at the top of each signature blank and upon the ballot. In most cases, unless the proposed measure is of exceptional length, we believe that it would be the course of wisdom and in the interest of the commonwealth that the proposed measure should be printed in full rather than in some abbreviated form. While this would add to the expense of printing, it might be less expensive and less disadvantageous to the interests of the public than the operation of an enormously powerful signature machine by petition signers and voters who did not clearly understand what they were petitioning or voting for. The initiative machinery is better adapted to relatively short and simple measures, the whole of which can be printed upon the petition blanks and upon the ballot in order that people may understand clearly what they are doing, than it is for the more complicated questions of government involving much detail and a variety of administrative problems.

F. W. G.

SENATE . . . . No. 395

The Commonwealth of Massachusetts

OPINIONS OF THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME JUDICIAL COURT RELATIVE TO THE CONSTITUTIONALITY OF THE PROPOSED INITIATIVE PETITION OF FRANK A. GOODWIN AND OTHERS FOR THE ESTABLISHMENT OF A STATE MOTOR VEHICLE INSURANCE FUND TO PROVIDE COMPENSATION FOR INJURIES AND DEATHS DUE TO MOTOR VEHICLE ACCIDENTS.

SENATE, March 27, 1930.

Whereas, A document purporting to be an initiative petition for a proposed law under Article forty-eight of the Amendments to the Constitution, in the form shown by the petition blank, copy of which is submitted herewith, has been transmitted to the Clerk of the House of Representatives by the Secretary of the Commonwealth; and

Whereas, Said document and said proposed law (printed as House, No. 202, a copy of which is submitted herewith) have been referred for consideration to the joint committee on Insurance of the two branches of the General Court; and

Whereas, There is pending before the General Court and likewise referred to said joint committee, the report of the special commission to study compulsory motor vehicle insurance and related matters, printed as Senate No. 280, a copy of which is likewise submitted herewith,

in which certain important questions of constitutionality and other questions of law are suggested in connection with said document and said proposed law; and

Whereas, Grave doubt exists as to whether said Article forty-eight has been so far complied with that said document properly constitutes an initiative petition and therefore whether said proposed law is legally "introduced and pending" before the General Court so that the procedure required by said Article forty-eight in relation to measures proposed by initiative petitions should be followed; and

Whereas, Grave doubt further exists as to the constitutionality of the provisions of said proposed law, if enacted, therefore be it

Ordered, That the opinions of the Honorable the Justices of the Supreme Judicial Court be required by the Senate on the following questions of law, which do not appear to have been raised before, or passed upon by, the Court: —

1. Does the "description of the proposed law" (as it appears on the petition blanks, copy of which is submitted herewith and as reprinted on pages 130 and 131 of said Senate, No. 280) required by said Article forty-eight to be printed at the top of each signature blank and also upon the ballot, meet the requirements of said Article forty-eight and adequately inform the voters as to the provisions of said proposed law, especially as to the differences between said provisions and the present system of compulsory motor vehicle liability insurance?

2. May a citizen of the Commonwealth be constitutionally required to make the contribution to the proposed fund as provided in said proposed law and be held to the terms of the contract as therein provided, as a condition precedent to the right to operate a motor vehicle on the ways of the Commonwealth, as defined in section one of chapter ninety of the General Laws?

3. Is the business of motor vehicle liability insurance such a public function or so subject to public regulation as to authorize the creation of a monopoly, such as is pro-

vided in said proposed law, and to require insurance therein as a condition precedent to the right to operate motor vehicles on such ways?

4. Is it constitutional to require the registrant of a motor vehicle, as a condition precedent of the right to operate a motor vehicle on such ways, to forego his present right to contract for insurance in a company of his own choice and to require him to contract for the same in a "fund" as constituted in said proposed law?

5. Under the present law, a person wishing to register a car for use on the highways has the option of making a deposit of money or securities, of filing a bond, or of providing an insurance policy, whether of a stock company or of a mutual company, from among some sixty or more insurance companies authorized to do business in the Commonwealth. Would it be constitutional to deny him this option?

6. Would it be constitutional to require a person, as a condition precedent of the right to operate a motor vehicle on such ways, to buy insurance of a concern whose only assets at the time the first contribution was accepted and the contract of insurance made would be the contribution received and the anticipation of other contributions, such assets being subject to a liability already incurred by loan necessitated for organization purposes, as provided by said proposed law?

7. Is it constitutional to require the registrant of a motor vehicle to purchase insurance in such a quasi-public corporation as is established by said proposed law, which is without the usual reserves and other safeguards required by law of insurance companies, in the absence of any guaranty of the solvency of such corporation by the Commonwealth?

8. Is the official machinery set up in said proposed law subject to the requirements of Article sixty-six of the Amendments to the Constitution, relative to the organization of the executive and administrative work of the Commonwealth?

9. If so subject, does said machinery conform to such

requirements as affected by the existing organization of the executive and administrative work of the Commonwealth?

10. Do the provisions of said proposed law, especially those contained in proposed sections twenty-six, twenty-nine A, thirty-three A and thirty-four A of chapter ninety of the General Laws, contemplate the unconstitutional use of public funds for a purpose not public?

11. If a motor vehicle owner who is registered under the provisions of said proposed law is also insured against personal liability by a private insurance company of his own choice, would said provisions or any of them constitute an unconstitutional interference with his right to defend himself against such liability or the right of said insurance company to conduct such defense?

12. Would said proposed law, if enacted, unreasonably create a monopoly and thereby violate the constitutional rights of companies now engaged in insuring under the present system of compulsory motor vehicle liability insurance?

13. Would it be constitutional to subject the policyholders, in a mutual company organized under the laws of Massachusetts, to losses incident to the creation of a monopoly such as is established by said proposed law?

WILLIAM H. SANGER,
Clerk.

A true copy: Attest:

WILLIAM H. SANGER,
Clerk of the Senate.

To the Honorable the Senate of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit these answers to the questions propounded in an order adopted on March 27, 1930, and transmitted to them on March 31, 1930, copy whereof is hereto annexed. These questions relate to an initiative petition for a proposed law under art. 48 of the Amendments to the Constitution.

The first question in substance is whether the "description of the proposed law," required to be printed at the top of each blank for signatures and also upon the ballot, conforms to the requirements of said art. 48 and adequately informs the voters as to the provisions of the proposed law. The words of said art. 48 on this point are in "General Provisions," Part III, that such proposed law "shall be described on the ballots by a description to be determined by the attorney-general," and in "The Initiative," Part II, § 3, that the Secretary of the Commonwealth "shall provide blanks for the use of subsequent signers [after the first ten], and shall print at the top of each blank a description of the proposed measure as such description will appear on the ballot," and in "General Provisions," Part III, that the "secretary of the commonwealth shall . . . cause such question . . . to be printed on the ballot . . . In the case of a law: Shall a law (here insert description . . .) be approved?" In said art. 48 there is no definition of the word "description." The debates of the Constitutional Convention which framed said art. 48 do not disclose any definition. Those debates indicate that the duty of preparing the description was cast upon the Attorney General to the end that one learned in the law and under a high official responsibility should draft that description. It would seem to be rational to infer that the purpose of the requirement that a description of the proposed law be printed on the initiative petition blanks, provided by the Secretary of the Commonwealth to be signed by the requisite twenty thousand qualified voters, is that such signers may have before

their eyes and in their minds when deciding whether to sign the petition an impartial statement of the dominant and essential provisions of the proposed law so that thereby they may obtain an accurate conception of its main characteristics. It may also be inferred that the reason for requiring the printing on the ballot of the same description is that the voter may have at hand some means for making up his mind whether to vote to approve or to disapprove the proposed law. Under "General Provisions," Part IV, the full text of each measure to be submitted, together with other information, must be sent to each voter. Nevertheless, the description must be printed on the ballot. "Description" in these circumstances signifies a fair protrayal of the chief features of the proposed law in words of plain meaning, so that it can be understood by the persons entitled to vote. It must be complete enough to convey an intelligible idea of the scope and import of the proposed law. It ought not to be clouded by undue detail, nor yet so abbreviated as not to be readily comprehensible. It ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy. It must contain no partizan coloring. It must in every particular be fair to the voter to the end that intelligent and enlightened judgment may be exercised by the ordinary person in deciding how to mark the ballot. The provisions of said art. 48 touching the description are mandatory and not simply directory. They are highly important. There must be compliance with them. *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91, 99.

It is to be observed that the title of the act copied from the act annexed to the initiative petition is easily susceptible of being misunderstood. That title is "An Act to create a Motor Vehicle Insurance Fund for the Purpose of Providing Compensation for Injuries and Deaths due to Motor Vehicle Accidents." Compensation in connection with personal injuries and death has come to mean a scale of payments based upon injury or death without reference to negligence or other civil liability at

law. That is the word used in connection with workmen's compensation with which large numbers of people are familiar. See workmen's compensation act, G. L. c. 152, §§ 26, 27, 28, 29, 31, 34, 35, 36, 37, 38, 39, 41. See also *Louis Pizitz Dry Goods Co. Inc.* v. *Yeldell*, 274 U. S. 112, 115. The proposed bill does not provide such compensation. It merely purports, according to the terms specified, to require owners of certain motor vehicles and trailers to furnish security for their civil liability on account of personal injuries caused by such motor vehicles and trailers. That is the correct title. It is the title of St. 1925, c. 346. It carries the implication of liability founded on negligence and not on injury regardless of negligence. This misleading title is not embodied in the "description"; but it is not corrected. While we should hesitate to say that, standing alone, this rendered the "description" defective, it may be mentioned in connection with other factors.

The "description" contains no reference to the highly responsible duties imposed by the proposed bill upon State officers. For example, all contributions to the fund must be collected by the registrar of motor vehicles and by him transmitted to the Treasurer and Receiver General, who is constituted the custodian of the fund and through whom all disbursements are to be made. In view of the number of motor vehicles in the Commonwealth, these collections and disbursements must involve very large sums of money and necessitate a great amount of work. The registrar of motor vehicles also must investigate every accident where personal injury in fact did or may result, for the purpose of ascertaining both whether criminal prosecution ought to be instituted and whether defence against claims for civil damages should be made. Inevitably he must employ a large corps of investigators for this purpose. Although there is reference in the "description" to an investigation of accidents, it contains nothing to indicate by whom the investigation is to be made. The laying of these heavy burdens upon these officials of the Commonwealth is an essential and momentous feature of the proposed bill.

Reference is made in the "description" to the fact that the amounts to be paid by each owner of a motor vehicle are fixed by the bill. But there is no indication that this rate is to be uniform throughout the Commonwealth for each classification of motor vehicles. The "description" contains no reference to or explanation of the meaning of such flat rate. Rates hitherto have been established according to territorial zones. *Brest* v. *Commissioner of Insurance*, Mass. Adv. Sh. (1930) 113. The "description" makes no reference to the fact that if the rates established by the bill or as changed from time to time by the commissioners prove to provide funds inadequate to meet the losses, that deficiency must be made up by an increase of rates for the following year, thus requiring payments from a body of individuals different from the body incurring the losses.

The "description" states that the "present compulsory motor vehicle insurance law is to be repealed, as is also the existing law limiting the time for beginning actions of tort for bodily injuries or death to one year, and certain other acts inconsistent with the proposed law are also repealed." This is apparently an attempt to describe §§ 1 and 2 of the proposed law as well as certain other repeals. This "description" does not confine the statement of repeal of the statute of limitations to actions of tort connected with motor vehicles. It is unrestricted in scope and comprehends all existing statutes touching actions of tort for bodily injuries or for death. This "description" is both inaccurate and insufficient. The repeal made by § 1 of the proposed law includes only the existing statute of limitations defining one year as the time for bringing "actions of tort for bodily injuries or for death the payment of judgments in which is required to be secured by chapter ninety." G. L. c. 260, § 4, as amended by St. 1921, c. 319, § 1; St. 1925, c. 346, § 10; St. 1929, c. 29, § 1. That is to say, it repeals the special statute of limitations as to actions of tort for bodily injuries or for death upon ways of the Commonwealth arising from those motor vehicles and trailers whose owners must under existing law furnish security

for such civil liability. The proposed law leaves untouched all other existing statutes limiting to one year the time for bringing actions of tort for bodily injuries or for death arising in other ways. There are a number of such statutes. See for example G. L. c. 153, § 6; c. 229, § 1 (as amended by St. 1929, c. 119, § 1), § 2 (as amended by St. 1921, c. 486, § 35), §§ 3, 10. These references may not be exhaustive. They are illustrative. The "description" is inaccurate in that it includes all these statutes as among those repealed. The "description" is insufficient in that by § 1 of the proposed law the limitation to one year after the rendition of the judgment for bringing suits in equity to enforce against an insurer payment of a judgment for personal injuries or death caused by the insured is repealed. That repeal is not required because "inconsistent with the proposed law." It relates to an independent and important matter, to which no reference is made in the "description."

We are of opinion that the "description of the proposed law" does not meet the requirements of said art. 48 and we answer the first question in the negative.

A body corporate to be called "The State Motor Vehicle Insurance Fund," hereafter called the "Fund," is to be created by the proposed bill. This is not a private business corporation in the sense in which those words are commonly used. It has no capital stock and no stockholders. It is to have no money with which to start business. Its only financial resources are the power to borrow and the right to receive contributions from owners of motor vehicles and trailers. It has elected no officers. Its managers, consisting of a commissioner and two associate commissioners, named "the board," are to be appointed by the governor subject to approval by the council. It is not designated as, nor attached to, a department of the Commonwealth. The members of the board are not subject to removal. They are not in any particular under the direction of the governor or of any other officer of the Commonwealth. The Commonwealth has no responsibility for the management of the corpora-

tion. The credit of the Commonwealth cannot be pledged to its support. The word "State" in the corporate name of the "Fund" imports no responsibility on the part of the Commonwealth. Many purely private corporations have the word "State" as a part of their corporate names. The term *quasi* public corporation was applied to the "Fund" in *Horton* v. *Attorney General*, Mass. Adv. Sh. (1930) 149, 153, chiefly because under the provisions of the proposed law large numbers of the public would imperatively be brought into business relations with it and be deemed to be parties to contracts with it, not by their own volition but by coercion of law .That descriptive term was used in *Attorney General* v. *Haverhill Gas Light Co.* 215 Mass. 394, 398. See also 1 Thompson on Corporations (2d ed.), §§ 32, 33; 5 Cook on Corporations (8th ed.), §§ 891, 932. The board is given unrestricted power as to the administration of the "Fund." It has complete authority to appoint and to remove all subordinate officers and employees of the corporation, to fix their terms of service, to define their duties and to establish their compensation. No civil service or other laws govern them in this respect. While the Treasurer and Receiver General is the custodian of the moneys of the "Fund" and its disbursing agent, he is compelled to act in this capacity exclusively under the direction of the board and not, in any particular, subject to general laws governing his conduct as an officer of the Commonwealth. It seems to us plain that the "Fund" as established by the proposed law is not a public corporation in the sense that it is established as an instrumentality of government. Perhaps in strictly legal aspects and functions it would stand on the footing of a private corporation. See *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.* 258 U. S. 549. Certainly it would differ in essentials from a corporation constituted by law as an agency or department of government. See *United States* v. *McCarl*, 275 U. S. 1; *Emergency Fleet Corp.* v. *Western Union Telegraph Co.* 275 U. S. 415.

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as a corporation with its specified powers differs radically from statutes, which have been upheld, for affording compensation for certain damages done by dogs, *Blair* v. *Forehand*, 100 Mass. 136, 142, and by drunken persons, *Treasurer of Boston* v. *American Surety Co. of New York*, 217 Mass. 507, and for protection of titles registered in the Land Court, *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71.

If the "Fund" were designed to be a public corporation or agency for carrying on what was deemed to be a function or department of government, the proposed law plainly would be unconstitutional as establishing a new department in contravention of art. 66 of the Amendments. It is not necessary to consider other questions which would arise if it were such agency or department.

Powers of the Legislature respecting the control of travel on the highways and the regulation of the business of insurance are extensive. Those subjects were discussed at large in *Opinion of the Justices*, 251 Mass. 569, 594–597, 607–610. What there was said need not be repeated. *Interstate Busses Corp.* v. *Holyoke Street Railway Co.* 273 U. S. 45. Broad as those powers are, we are of opinion that they do not extend so far as to compel every owner of a motor vehicle (with exceptions not here material), before using it upon a highway, to pay tribute by contribution to such a corporation as is created by the proposed law. That there is a large business by existing corporations of insuring owners of motor vehicles against civil liability resulting from the operation of such vehicles on ways is matter of common knowledge. Such insurance is required by St. 1925, c. 346, and acts in amendment thereof. It is generally known that there is wide competition for business of this kind. It involves freedom of action on the part of the owners of motor vehicles and on the part of those competing for such insurance. In practical effect it seems plain that the proposed law, because of its compulsory features, would drive most competitive insurance out of business in the motor vehicle field, and create a substantial monopoly in the "Fund."

The creation by such means of a monopoly in a private or *quasi* public corporation in the field of competitive business goes outside the power of the Legislature. Monopolies are odious to the law. They may be created in public utilities, which in a sense are natural monopolies or monopolistic in character, all in the public interest and subject to regulation for the general welfare. *Commonwealth* v. *Dyer*, 243 Mass. 472, 486–489. But as to general business affairs they would interfere with the constitutional rights of every person to life, liberty and property, "including freedom to use his faculties in all lawful ways, 'to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned' . . . These rights, however, are subject to limitations, arising under the proper exercise of the police power." *Commonwealth* v. *Strauss*, 191 Mass. 545, 550. *Commonwealth* v. *Boston Transcript Co.* 249 Mass. 477, 483. *Tyson & Brother* v. *Banton*, 273 U. S. 418. The creation of such a corporation as that designed by the proposed law, in our opinion, cannot be justified as an exercise of the police power.

Therefore, interpreting the questions solely with reference to the proposed law, confining ourselves strictly to its terms, and not considering abstract principles connected with the inquiries, we answer "No" to questions 2, 3, 4, 5, 6, 7.

For the same reasons and with the same limitations, we answer "Yes" to question 12 and "No" to question 13, recognizing at the same time that all property and rights of individuals and corporations are subject to every valid exercise of the police power even though it may drive certain persons out of business. *Opinion of the Justices*, 234 Mass. 597, 607–611 and cases there reviewed.

We answer "No" to question 8 because, as already stated, we interpret the proposed law to create a *quasi* public corporation with many aspects of a purely private

corporation and not a corporation constituted as an agency or department of government. In view of this answer, it is unnecessary to answer question 9.

The provisions of § 26 in § 3 of the proposed law are in substance that the operator of every motor vehicle or trailer involved in an accident in which any person is killed or injured shall make reports there specified. Its provisions as applied to conceivable cases may be drastic. If a state of fact should arise where by its operation constitutional rights would be infringed, it might be held inapplicable. *Sears* v. *Aldermen of Boston*, 173 Mass. 71, 80. *Magee* v. *Commissioner of Corporations & Taxation*, 256 Mass. 512, 518. In the main we perceive nothing violative of the fundamental law in this section.

The provisions of §§ 29A, 33A and 34A in § 3 of the proposed law impose upon the registrar of motor vehicles extensive duties of investigation as to motor vehicle accidents, the duty of collecting from every registrant of a motor vehicle all contributions to the "Fund" and transmitting such collections to the Treasurer and Receiver General, and impose upon the Treasurer and Receiver General the duty of being the custodian of the "Fund" and disbursing all payments due from it. It follows from these provisions that the employment of all investigators, clerks, assistants and other employees must fall upon these officers. These officers cannot be compelled to accept employees designated by such a corporation as the "Fund." It would be an unthinkable derogation from the sovereign power of the Commonwealth to require its officers such as are the Treasurer and Receiver General and the registrar of motor vehicles to accept as subordinates or employees persons appointed by the commissioner subject also to him both as to removal and as to salary. See § 41 of § 3 of the proposed bill. It is provided by § 29A that such proportion of the expenses of the investigations of motor vehicle accidents by the registrar of motor vehicles "as may be agreed upon by the registrar, the commissioner of the fund and the chairman of the department of administration and finance, shall be charged" to the "Fund." There is no

provision that any other expenses thus imposed upon the registrar of motor vehicles and the Treasurer and Receiver General shall be paid by the "Fund." We do not think that the provisions of § 34A of § 3 are fairly to be construed as requiring payment from the "Fund" of such expenses thus thrown upon these State officers. These expenses must be paid out of money raised by taxation. Such expenses are ancillary to the business of this corporation. Such a purpose is not public in its nature. It is elementary that public money can be expended only for public uses. The point involved in this question is quite different from the issue presented in *Horton* v. *Attorney General*, Mass. Adv. Sh. (1930) 149, 155, 156, where it was held that the proposed law made no "specific appropriation of money from the treasury of the Commonwealth." A general and indefinite burden imposed upon the public treasury is wholly variant from a "specific appropriation," forbidden by said art. 48, "The Initiative," Part II, § 2, "*Excluded Matters.*" It falls within the concluding phrase of the first paragraph of that section, to the effect that, "if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect." We do not pause to consider the special difficulties attendant upon the ascertainment of the proportion of the expenses of investigation to be charged to the "Fund." We are of opinion that §§ 33A and 34A contemplate the unconstitutional use of public funds, and answer "Yes" to that part of question 10.

It seems to us that question 11 requires no answer in view of the answers to the other questions.

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April 15, 1930.